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Misguided Instructions: Do Jurors Accurately Understand the Law in Death Penalty  
Trials?

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A thesis  
presented to  
the Faculty of the Department of Criminal Justice and Criminology  
East Tennessee State University

In partial fulfillment  
of the requirements for the degree  
Master of Arts in Criminal Justice and Criminology

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by  
Chasity Anne Stoots-Fonberg  
May 2003

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Keywords: Aggravators, Capital Punishment, Death Penalty, Judicial Sentencing  
Instructions, Jury, Mitigators

## ABSTRACT

Misguided Instructions:

Do Jurors Accurately Understand The Law In Death Penalty

Trials?

by

Chasity Stoots-Fonberg

The Sixth Amendment of the U.S. Constitution guarantees individuals' right to trial by an impartial jury. However, empirical research indicates that the jury system is flawed, especially regarding judicial sentencing instructions. More specifically, jurors frequently misunderstand or misinterpret State-patterned instructions. On a more encouraging note, there is evidence that comprehension of jury instructions can be improved. Thus, this research assessed improvement in juror comprehension using revised sentencing instructions. For the current investigation, participants included 201 volunteers called for jury duty in Western Tennessee. Data were generated via a questionnaire that allowed for the collection of information relating to participants' understanding of the sentencing instructions. Findings suggest that comprehension is low when jurors are only exposed to instructions written by the State. Furthermore, when jurors were given a more detailed explanation of certain problematic terminology, comprehension significantly increased. Policy implications of this research and directions for future improvement are discussed.

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## CHAPTER 1

### INTRODUCTION

The majority of states that permit executions allow jurors to decide whether or not to impose a sentence of death (Diamond, 1993; Gillers, 1980; Hans, 1988). The role of the jury in a criminal trial is to decipher the facts from the evidence and then to apply the law to those facts (Luginbuhl & Howe, 1995) while maintaining a level of impartiality that meets the guidelines of the U.S. Constitution (Blankenship, Luginbuhl, Cullen, & Redick, 1997). The appropriate law is given to the jurors through instructions from the judge prior to the jury's deliberations; thus, judicial instructions play a critical role in the outcome of a trial. Specifically, the importance of this role is magnified in the sentencing phase of a capital trial, the point at which the jury has the ultimate moral decision: whether a defendant will live or die. In 1966, Kalven and Zeisel captured the importance of the juror system:

The Anglo-American jury is a remarkable political institution...[which] represents a deep commitment to the use of laymen in the administration of justice....It opposes the cadre of professional, experienced judges with this transient, ever-changing, ever-inexperienced group of amateurs. The jury is thus by definition an exciting experiment in the conduct of serious human affairs, and it is not surprising that, virtually from its inception, it has been the subject of deep controversy, attracting at once the most extravagant praise and the most harsh criticism (p. 3).

Juror responsibility for sentencing decisions in capital cases has been subjected to increasing inquiry during the past several decades. Much of this attention has been directed at juror's understanding of judicial instructions (Blankenship et al., 1997; Frank & Applegate, 1998). Since the United States Supreme Court decision in *Gregg v Georgia* (1976), efforts to attain a procedurally just system of capital punishment have focused on

the use of judicial instructions to reduce juror bias or caprice (Haney & Lynch, 1994). The jury system, in a civil or criminal case, is founded on the assumption of the plausibility of informing laypersons about proper legal standards to apply to a set of facts. Further, the system is grounded on the supposition that these laypersons are sufficiently prepared to deliver an informed decision about the guilt or innocence of an accused defendant and, in death penalty cases, the punishment to be imposed (Severance & Loftus, 1982; Weltner, 1979). However, if jurors are incapable of understanding the instructions or if they elect to ignore them and impose their own standards, the process of having jurors render such essential decisions must be questioned.

### The Death Penalty Process in Tennessee

In the 1970s, Supreme Court decisions addressed the process necessary for determining which convicted defendants should be executed. The court in *Furman v Georgia* (1972) concluded that state sentencing systems did not provide protection against inconsistent and arbitrary imposition of the death penalty, thus, beginning a moratorium on death sentences. Subsequent to this decision, state legislatures enacted a variety of statutes intended either to eradicate juror discretion or to impose structure (Sandys, 1995).

In 1976, the U.S. Supreme Court permitted guiding jurors' discretion in *Gregg v Georgia*, *Profitt v Florida*, and *Jurek v Texas*. This model of "guided discretion" was implemented through the use of judicial instructions. At the start of penalty deliberations, judges give capital juries a series of issues or factors to consider in reaching their sentencing decision (Haney & Lynch, 1994). The judicial instructions serve a number of

functions: the judge orients jurors in their task, outlines the undisputed facts and issues of the case, explains the relevant law, and informs jurors about procedural matters (McBride, 1969). Specifically, the *Gregg* plurality noted that where a sentencing body has discretion to take or spare a life, "that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" (McBride, p. 189). Moreover, the jury must be "given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision" (McBride, p. 192).

In contrast to the guided discretion model, some states made death mandatory for specified crimes (Weisberg, 1984); however, this model was rejected in *Woodson v North Carolina* and *Roberts v Louisiana*, decided with *Gregg*, *Profitt*, and *Jurek*. Specifically, a plurality of the Court held that a statute mandatorily imposing capital punishment for specified crimes is virtually unconstitutional by definition because it treats those convicted of a crime "as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death" (*Woodson v North Carolina*, 1976, p. 304). Further, the Court affirmed that "death is different" from other types of punishments; thus the Eighth Amendment to the U.S. constitution standard of "individualized justice" could not be met when states imposed mandatory sentences (Blankenship et al., 1997). In other words, this option directed the jury's discretion so narrowly that there was limited discretion available for the jury to exercise (Tiersma, 1995).

As a result of the Georgia, Florida, and Texas cases, the U.S. Supreme Court based its Eighth Amendment jurisprudence governing capital punishment on two fundamental principles. The first principle of "guided discretion" required that the

sentencer's discretion be narrowly guided as to which circumstances subject a defendant to the imposition of the death penalty. The second principle of "individualized consideration" mandated that the sentencer be allowed to consider all evidence concerning the offender as well as the offense that might argue for a sentence other than death. These principles of guided discretion and individualized consideration contain almost the entire foundation upon which the Court has constructed its framework of constitutional rules regulating capital punishment (Sundby, 1991).

To avoid treating defendants as an "undifferentiated mass," the sentencer should focus not only on the nature of the crime itself but also on defined characteristics of the defendant and the case (Blankenship et al., 1997). In most states, these issues are known as mitigating factors if they suggest a more lenient penalty and as aggravating factors if they support the imposition of the death penalty, factors that jurors were compelled to consider before rendering a death sentence. In considering these factors, the implementation of capital sentencing discretion is to be guided and thus ostensibly freed of constitutionally impermissible caprice, arbitrariness, and discrimination (Bowers, Sandys, & Steiner, 1998).

### General Application

The specifics surrounding the utilization of aggravators and mitigators vary according to state. The state of Georgia uses a "threshold" statute that requires the jury to find at least one statutorily defined aggravating circumstance before it can impose a death sentence. Florida's "balancing" statute requires juries to "weigh" aggravating circumstances against mitigating circumstances; if the former outweigh the latter, the jury

may impose a sentence of death. Tennessee uses a combination-the jury must find at least one aggravating circumstance and then must determine if any mitigating circumstance or circumstances exist that outweigh the aggravating circumstance. If no aggravating circumstance exists or if a mitigating circumstance or circumstances outweigh the aggravating circumstance, then the jury must return a life sentence. Texas uses a third variation of guided discretion statutes, first by limiting death to those that meet enumerated aggravating circumstances and then by directing the jury to answer three special issues: future dangerousness, culpability, and mitigating circumstances, before a sentence of death can be meted out.

The Supreme Court considered the constitutionality of the Texas capital sentencing statute in *Jurek v Texas*, in which the defendant was convicted of capital murder for killing a 10 year old girl committed during the course of a kidnapping and attempted rape. Because the offense was one of the specified capital crimes listed in Texas' sentencing statute, the trial court instructed the jury to determine the defendant's punishment based solely on the answers to the two relevant special issues, with the third issue being deemed non-relevant. A unanimous jury answered both issues in the affirmative and, accordingly, the judge sentenced the defendant to death (*Jurek v Texas*, 1976, p. 267-268).

Subsequently, the defendant appealed all the way to the Supreme Court, arguing that post-*Furman* changes in Texas' sentencing statute were "no more than cosmetic in nature and ha[d] in fact not eliminated the arbitrariness and caprice of the system held in *Furman* to violate the Eighth and Fourteenth Amendments" (*Furman v Georgia*, 1972, p. 274). Examining the statute in light of the contending principles articulated in *Furman*

and the mandatory sentencing cases, the Court reasoned that the "constitutionality of the Texas procedures turns on whether the enumerated questions, or special issues, allow consideration of particularized mitigating factors" (*Jurek v Texas*, 1976 p. 272). Specifically, the Court examined the Texas Court of Criminal Appeals' interpretation of the second special issue to resolve this critical question. The Texas Court of Criminal Appeals had "indicated that it will interpret the second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show" (p. 273). Based on this broad interpretation of the second issue, the Supreme Court concluded that "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death" (*Jurek v Texas*, 1976, p. 273-74). As a result, the Texas sentencing statute did not violate the requirements of the Eighth Amendment.

*Lockett v Ohio* (1978) further examined the issue by distinguishing its decision in *Jurek* by noting that the Texas Court of Criminal Appeals had broadly interpreted the second special issue in the Texas sentencing statute. Unlike the Ohio statute, which limited the number of mitigating factors the sentencer could consider, the broad scope of Texas' second special issue did not "prevent the sentencer [in *Jurek*] from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor" (p. 604). Thus, although the composition of the Ohio and Texas capital sentencing statutes was similar, the Court's refined Eighth Amendment interpretation in *Lockett* did not affect the facial constitutionality of the Texas statute. *Lockett* further declared off-limits any effort to limit the evidence a defendant could

present as a defense to the death penalty so long as the evidence touched upon the defendant's character or the nature of the offense.

### Tennessee's Application

Subsequent to the preceding decisions, Tennessee, like most states, now uses a bifurcated trial procedure in capital cases. During the first phase, the jury listens to the evidence presented and makes a decision regarding the defendant's guilt. If the verdict results in a first-degree murder conviction, the jury then receives additional evidence presented in the penalty phase of the trial. The state introduces evidence of aggravating circumstances that focus on specific characteristics of the defendant or on elements of the murder. Next, the defense presents evidence of mitigating circumstances that concentrate on the defendant's characteristics or on the circumstances surrounding the murder. Mitigating factors affect the degree of punishment to be imposed on a defendant convicted of a crime; however, they do not lessen the severity of the crime. After testimony has concluded, the jury then receives instructions from the presiding judge, which are based on Tennessee's criminal code (Blankenship et al., 1997).

The judicial instructions command the jury to ascertain if an aggravating circumstance exists. If the jury finds the presence of one or more aggravators, the instructions then require the jury to determine if one or more mitigators exist that "outweigh" the aggravating circumstances. Consequently, Tennessee follows the pattern set forth by the *Florida* ruling of weighing or balancing aggravators against mitigators. Then, if it is found that no mitigators exist or that a mitigator exists but does not outweigh



the aggravators, the jury is mandated to impose a sentence of death (Blankenship et al., 1997).

Aggravating circumstances are enumerated or specified in the instructions given to the jury during the second stage of a capital trial (see Appendix A). Jurors are prohibited, according to the Tennessee statute, from considering nonenumerated, or "unwritten," aggravating circumstances. Examples of mitigating circumstances are provided in the instructions as well (see Appendix A); whereby, jurors are also free to consider nonenumerated mitigating factors (*Lockett v Ohio*, 1978). In conclusion, Tennessee juries are instructed to follow methodical measures in resolving the existence of aggravating and/or mitigating circumstances, and the weight given to the circumstances (Blankenship et al., 1997).

As for the presence of aggravating factors, the state maintains the burden of proving their existence. Thus, the state is held to the highest legal standard, proof beyond a reasonable doubt beyond a moral certainty, and unanimity of the jury. However, the standard of proof and the presence or absence of jury unanimity concerning the existence of mitigating factors is omitted from the Tennessee sentencing instructions, even though the importance of this criteria was set forth in *Mills v Maryland* (1988) as well as in *McKoy v North Carolina* (1990). The Court held that the sentencing instructions must state clearly to jurors that mitigating factors need not be found unanimously (Blankenship et al., 1997). Specifically, *McKoy* concluded that by requiring unanimity, jurors are constricted in considering mitigators and this contradicts *Mills*, which states that the sentencer must be able to consider all mitigating evidence.

If a mitigator is found to exist, the sentencing instructions require jurors to weigh that circumstance against the aggravating circumstance. Again, however, the Tennessee instructions do not include any direction on how jurors are to go forward in the process of weighing. More importantly, according to the instructions, jurors must be unanimous in determining if a mitigating circumstance outweighs the aggravating circumstance, but the jury does not have to yield unanimity as to whether or not a mitigator exists. Thus, confusion may exist as to whether or not unanimity must exist.

### Statement of the Problem

As is evidenced above by the lengthy history of U.S. Supreme Court precedent, the specifics of a juror's duty to defendants in a capital case can be mystifying, thus resulting in life changing decisions based on something other than facts guided by laws. Jurors may be quite competent at sorting out the facts, but they have a difficult time understanding the judge's instructions, which often results in omitting crucial distinctions (Reifman, Gusick, & Ellsworth, 1992). Study after study has shown that jurors do not understand the law they are given, often performing, at best, at chance level on objective tests of comprehension (Buchanan, Pryor, Taylor, & Strawn, 1978; Charrow & Charrow, 1979; Ellsworth, 1989; Elwork, Sales, & Alfini, 1977, 1982; Forston, 1975; Frank & Applegate, 1998; Garvey, Johnson, & Marcus, 2000; Haney & Lynch, 1994; Hastie, Penrod, & Pennington, 1983; Kaplan & Kemmerick, 1974; Kassin & Wrightsman, 1979; Kerr et al., 1976; Luginbuhl, 1992; Severance & Loftus, 1982; Steele & Thornburg, 1988; Strawn & Buchanan, 1976; Wiener, Pritchard, & Weston, 1995). Juries making capital punishment decisions must accurately understand legal instructions if they are to

perform their duties properly. The U.S. Supreme Court overlooks juror fallibility in light of overwhelming contradicting evidence that jurors often do not understand these instructions. For example, jurors often do not know what constitutes a mitigating factor and how one is to be considered in the scheme of the sentencing process. Prior research has suggested that jurors are unable to consistently apply the appropriate legal standard for concluding the existence of mitigating circumstances (Blankenship et al., 1997; Eisenberg & Wells, 1993; Haney & Lynch, 1994; Luginbuhl, 1992; Tiersma, 1995).

The current research (referred to as second sample or revised sample) is a follow-up to the first sample (referred to as the original sample) used in the study, which was completed by Blankenship et al. (1997) in Shelby County, Tennessee. In that study, sample one, a questionnaire was administered to volunteers who had been summoned for jury duty in that county. Three jury pools were sampled giving a total sample of 495 usable questionnaires. Included in the questionnaire were the sentencing instructions provided by the state of Tennessee, as well as scenarios to test five different areas of comprehension. Blankenship et al. found that overall jurors did not understand the instructions put forth to them.

Thus, the focus of the current research was to determine if jurors' level of comprehension of sentencing instructions can be improved by using revised sentencing instructions instead of the original instructions given by the state. The second sample in the study was designed to evaluate jurors' comprehension level of revised (sample two) sentencing instructions (see Appendix B) compared to the level of jurors' understanding of the original (sample one) sentencing instructions, conducted by Blankenship et al., 1997. Specifically, the research focused on the ability of jurors to: differentiate the

requirement of jury unanimity for mitigating circumstances; ascertain the unanimity requirement for weighing mitigating circumstances against aggravating circumstances; comprehend the instructions for finding non-enumerated mitigating circumstances; understand the level of proof required for mitigating circumstances; and understand the requirement for weighing mitigating circumstances against aggravating circumstances.

A set of scenarios was used to measure each of the five concepts to determine comprehension level of the judicial sentencing instructions (see Appendix C). Proportions were calculated for each scenario for each possible answer, "yes," "no," and "don't know." Then, a z-score was calculated for the correct answer from both waves of the study for each scenario to determine if an improvement was significant or simply a chance improvement.

### Limitations of the Study

Although this research provides valuable insights into the effects of juror misunderstanding of capital sentencing instructions by jury panels, a number of potential limitations were recognized. First, although the sample was derived from prospective jurors who had been called for duty, the participants did not actually deliberate as actual jurors. As such, they were not subjected to the constraints of being part of the adjudication process and likely had less information about the defendants discussed in the scenarios than most jurors have in the sentencing phase of an actual capital trial (Hans, 1988; Severance & Loftus, 1982).

Due to the reticence of the jury process, researchers still do not have a complete understanding of the experience for actual jurors. Thus, given the minimal understanding

of the death penalty decision process, it can be difficult to generalize from the findings of an experimental simulation. In the end, though, the generalizability of interview or simulation studies is an empirical question that can only be affirmed via continuing research that can clearly and effectively establish the representativeness of findings (Costanzo & Costanzo, 1992). However, according to Cook and Campbell (1979), this issue alludes to the principle of external validity, referring to the ability to generalize findings to other times, geographic locations, or populations. Because the Shelby County jury pool was randomly selected, the researchers had the ability to infer from the sample to the population of all jurors in Shelby County, but generalizing to other jurisdictions may not be plausible.

Despite these potential limitations, the current study provided evidence that juror understanding of pattern instructions was lacking and that understandability can be improved. As such, the findings presented here question whether the discretion of jurors is being sufficiently guided as the Supreme Court implied in its earlier findings (*Gregg v Georgia*, 1976; *Jurek v Texas*, 1976; *Profitt v Florida*, 1976).

### Importance of the Study

The responsibility of capital juries is monumental. These individuals are expected to subsequently make a decision as to whether or not the accused will live or die. Therefore, with such a burdensome decision put upon these common laypersons, the least that can be expected are instructions that adequately direct the individuals' towards reaching the most just verdict. In some cases in jurisdictions in which the judges give jurors written instructions, aside from other exhibits, the instructions will be the only

tangible thing the jurors take with them into the deliberation room (Greene, 1986). However, most jurors view the judge as the embodiment of impartial justice (Dombroff, 1985) and consequently attach immense significance to the instructions. As such, the underlying assumption is that the instructions effectively communicate the legal rules to the jurors (Imwinkelried & Schwed, 1987).

Therefore, the importance of the current study is quite significant in that it sheds light on the naivete of that assumption by many court officials and legislators. Specifically, the research identified intricacies of the Tennessee judicial sentencing instructions that were impacting many defendants and their ability to receive a fair and unbiased trial according to the Sixth Amendment to the U.S. constitution. In short, the current study revealed that when the instructions were poorly worded or vague, or when serious omissions concerning the law existed, jurors' comprehension was significantly limited. Thus, in actual Tennessee capital cases, death sentences may have been inflicted unconstitutionally (Blankenship et al., 1997). However, the current research suggests that comprehension can be improved, but not perfectly.

## CHAPTER 2

### REVIEW OF THE LITERATURE

#### The Historical Context of Juries

According to the law of the English, the Magna Carta has emerged as a document of importance since it was first issued by King John on June 15, 1215 (Moore, 1973). This instrument has commonly been credited with guaranteeing trial by jury. Originally “juries” were used to pry facts out of citizens who were believed to be withholding information about criminal activity (Gleisser, 1968). King’s Courts were established where citizens were required to report crimes committed in the area. “Jurors” were 12 men in the area who were most likely to know the facts involved (McCart, 1965).

Gradually the trial system changed to the form used today. Instead of jurors’ being “qualified” because they were to a degree familiar with the facts, they became “qualified” because they did not know the facts (McCart, 1965). A long struggle had progressed to secure jury trials in order to assure impartial trials for those charged with committing crimes. Likewise, the struggle continued when the English colonists carried their system of justice to the New World (McCart).

The right to trial by jury was specifically mentioned in King James I's Instructions for the Government of the Colony of Virginia on November 20, 1606; whereby, all capital crimes, including but not limited to, major disturbances, rebellion, and conspiracy, were to be tried by juries. Subsequently, trial by jury was then introduced into the Massachusetts Bay Colony by 1628 (Moore, 1973). In addition, the Supreme Court of the United States in 1898 stated that, "When Magna Carta declared no freeman should be

deprived of life, etc., but by the judgment of his peers or by the law of the land, it referred to a trial by twelve jurors" (*Thompson v Utah*, 1898).

After reaching America, two significant events occurred that effected a radical change in the trial system. The first event was when John Peter Zenger was prosecuted and persecuted in New York City in 1734. Zenger was arrested for publishing libelous articles against the governor. At the trial, the judge instructed the jury to decide whether the publication had taken place and then he would decide whether the writing was libelous. The jury defied the judge and returned a verdict of not guilty. The action was applauded by the Colonists, ending judicial domination (McCart, 1965).

The second event came with the writings of Sir William B. Blackstone who wrote a complete textbook of the common law in 110 sections. It was published in three volumes and the first was issued in 1765. For the first time, an authoritative statement of the principles of common law, which traced the laws to the roots of their development, existed. Moreover, the Commentaries were used before and after the writing of the Declaration of Independence and it also must be given credit for assisting the Founding Fathers in drafting the Federal Constitution (McCart, 1965).

A guarantee of the right to jury trial in criminal cases was placed into most of the state constitutions adopted during the American Revolution (Gleisser, 1968). It is largely because of state constitutions that the right of jury trial continues in state courts. Most lawyers, however, state that the provision in the Fourteenth Amendment to the U.S. Constitution, which prohibits a state from depriving any person of life, liberty, or property without due process of law, does not require the state to provide a jury trial even in felony cases (Gleisser).



In fact, juries have nearly completely disappeared in England, have been greatly modified in France and Germany, are under way towards elimination in Scotland, have been wiped out in India, and Israel never had them at all (Gleisser, 1968). Reasons for the elimination and modification of the jury trial are numerous. They include the cost and time of juries in civil trials; the uncertainty of a trial by jury compared to trial by judge; a problem with jurors' ignoring the law and imposing a sentence as they saw fit; and limited education of the participating jurors. France created juries that must meet new qualifications: being over 30 years of age and have the ability to read and write.

Nonetheless, the last major nation to staunchly defend the value of juries and to oppose reforms in selecting jurors is America. It is in America that most of the emphasis is placed upon difficulties with judges rather than turning the spotlight on the inadequacies of the jurors (Gleisser, 1968). However, Gleisser addressed the urgency that if the jury system is to continue some changes must be brought about, either by selection of better jurors in general or by changing the methods by which jurors sit briefly and are dismissed before they can even learn the bare essentials of their assignment.

In the years preceding 1972, juries across the U.S. were generally given a large amount of discretion with almost no guidance in determining whether a convicted defendant was sentenced to death (Nakell & Hardy, 1987); thus, necessitating the creation of individualized sentencing schemes. Even the construction of juries contributed significantly to the arbitrary application of the death penalty during this time. The process of selecting a jury was biased in that the methods of jury selection excluded certain members of society. After the ruling was pronounced in 1940 in *Smith v Texas*, wherein, the U.S. Supreme Court declared the need to make the jury a "body truly

representative of the community," (*Smith v Texas*, 1940, p. 130) prejudiced practices continued.

Throughout time the prejudiced practices of impaneling juries have continued. Instead of random selection, jury commissioners typically selected the names of "men of recognized intelligence and probity" from notables or "key men" of the community. As late as 1967, a survey reported that 60% of federal courts still relied significantly on this key man system for the selection of jurors (Abramson, 1994). Not until 1975 did the U.S. Supreme Court impart the ideal of the cross-sectional jury to state courts, ruling that the very meaning of the constitutional guarantee of trial by an impartial jury required that the jury pool be representative of the eligible community population (*Taylor v Louisiana*, 1975, p. 528).

#### Post-*Furman* Arbitrary Application of the Death Penalty

In 1972, by a 5-4 vote, *Furman* invalidated nearly every death-sentencing statute in place in the United States. *Furman* held that all the statutes were arbitrary and possibly discriminatory and, thus, violated the cruel and unusual punishment clause of the Eighth Amendment. However, in 1987 the *McCleskey* decision, which was also decided by a 5-4 vote, repudiated a claim of arbitrariness and discrimination in the administration of Georgia's post-*Furman* death sentencing system. In the process, any hope was abolished that the United States Constitution would be interpreted to require equal justice in the administration of the death penalty system.

Although the five concurring justices in *Furman* did not conclusively agree whether racially discriminatory sentencing had actually occurred in the past, *Furman*

certainly suggested that death-sentencing procedures could create an intolerable risk of discriminatory sentences. In this respect, however, the United States Supreme Court's post-*Furman* opinions are less explicit (Baldus, Woodworth, & Pulaski, 1990). It was not until 1986 in the *Turner v Murray* decision that the Court gave any special consideration to sentencing decisions that may have been tainted by race or other impermissible factors.

Between 1972 and 1976, 35 states enacted new death penalty statutes that aspired to make death penalty decisions routine instead of random. Different states attacked the problems in *Furman* from various angles. For example, North Carolina and Louisiana abolished jury discretion and mandated the death penalty for specific crimes such as murder of a police officer, murder for hire, or murder committed during a felony (Abramson, 1994). Other states, led by Georgia, Florida, and Texas, preserved the judge's or jury's discretion in making the final decision but attempted to narrow the exercise of discretion by legislating standards for the death sentencer to apply. From this, in 1976 the U.S. Supreme Court constructed a two-pronged process (Abramson). The first prong, still prevalent today, was the requirement of "individualized sentencing" in death penalty cases. With each case being unique, the Courts were required to consider defendants as individuals and, thus, tailor the punishment accordingly. Consequently, mandatory death sentences were considered unconstitutional.

The second prong, declined as far as importance since 1976, was the principle of treating like cases alike. Following this, the Court attempted to shift its focus from individualized justice to more consistent justice (Abramson, 1994). The Court emphasized the importance in treating similar cases with similar crimes in a more symmetrical fashion.

### Death Qualification of Jury

With the increased public awareness and debate over capital punishment in the past couple of decades, researchers have focused their attention on potential bias of capital juries (Luginbuhl, 1992). Capital jurors differ from the general community and from jurors in other cases. This is due in large part because death penalty jurors must undergo death qualification (Hans, 1988), which occurs during jury selection. It has been revealed that the death-qualification process itself biases jurors into thinking that the defendant is guilty (Haney, 1984). In addition to routine questions about attitudes and personal experiences relevant to the case, prospective capital jurors are asked if they will be able to consider a death sentence if the defendant is found guilty of a capital crime. The U.S. Supreme Court ruled in 1985 that potential jurors whose beliefs "substantially impair" their ability to impose a death sentence should be removed from jury service (*Wainwright v Witt*, 1985). This standard replaced the previous one set forth in *Witherspoon v Illinois* (1968), which stated that only those persons who were unalterably opposed to the death penalty were excluded. Judges often dismiss potential jurors who display attitudes that interfere with their ability to follow the law. Moreover, prosecuting and defense attorneys challenge and attempt to remove jurors who they perceive to be unsympathetic to their case (Costanzo & White, 1994).

Various other studies have shown that death-qualified jurors have an increased likelihood of convicting a capital defendant over non-death-qualified jurors (Bronson, 1970; Cowan, Thompson, & Ellsworth, 1984; Goldberg, 1970; Jurow, 1971; Luginbuhl, Kadane, & Powers, 1991). Further, Luginbuhl and Middendorf (1988) found that death-qualified jurors were more persuaded by aggravating circumstances and less persuaded

by mitigating circumstances than were non-death-qualified jurors. Their findings were akin to those of Thompson, Cowan, Ellsworth, and Harrington (1984) who determined that death-qualified jurors tend to support the prosecution rather than the defense in their approach to a case. In addition, several studies (e.g., Boehm, 1968; Goldberg, 1970; Jurow, 1971; Moran & Comfort, 1986) have shown that death-qualified jurors are more authoritarian (Adorno, Frenkel-Brunswick, Levinson, & Stanford, 1950), as well as more punitive. Subsequently, this abundance of research suggests that defendants, despite the merits of the case, are at a considerable disadvantage in capital trials because of death-qualified jurors. The current research expands this exploration by investigating the comprehensibility of the instructions given by a judge in a capital trial.

### Life Juries versus Death Juries

It is believed that views of capital punishment are part of an array of crime and justice attitudes; thus, death-qualified jurors possess other distinctive perspectives that predispose them to view evidence more negatively to the defense. For example, compared to those who would be excluded from a capital jury due to their opposition to the death penalty, death-qualified jurors are more likely to trust prosecutors and distrust defense attorneys; consider inadmissible evidence even if instructed by the judge to ignore it; and infer guilt from a defendant's silence (Fitzgerald & Ellsworth, 1984). It has been shown that death-qualified jurors are more hostile to psychological defenses such as schizophrenia (Ellsworth, Bukaty, Cowan, & Thompson, 1984). These jurors tend to view prosecution witnesses as more believable, more credible, and more helpful (Cowan et al., 1984). According to Fitzgerald and Ellsworth, these types of jurors are less likely

to believe in the imperfect nature of the criminal justice process, as well as less likely to agree that even the worst criminal should be considered for mercy.

Geimer and Amsterdam (1988) interviewed three capital jurors from five cases in which the jury agreed upon a life sentence and five cases in which the jury agreed upon a sentence of death. Juries rendering death sentences were inclined to believe that there was a presumption that they were to return a death sentence unless convinced otherwise. The most frequently cited reason for a capital sentence in the study was the gruesome or cruel manner in which the murder was carried out. Also, the most often cited factor for returning a life sentence was lingering doubt about the defendant's guilt.

According to Bowers and Steiner (1999), some jurors mistakenly thought that a capital murder verdict meant the death penalty, either because they thought the law mandated it or because they recognized it as the only acceptable punishment. Further, some jurors thought that specific aggravating characteristics of the crime, specifically the killing of a police officer, by itself, warranted capital punishment. Conversely, in some instances all or most of the jurors had decided by the time of guilt deliberations, they would not vote for the death penalty, indicating that it was not appropriate for the specific kind of crime. Moreover, jurors who voiced opposition to the death penalty gave specific reasons relating to concerns about mitigation, doubts about aggravation, or misgivings about the proof of guilt.

### Guilt and Penalty Phases of Capital Trials

According to Costanzo and Costanzo (1992), very little is known about the relationship between guilt and penalty phases and how the two interact. In the guilt phase,

jurors are asked to resolve what happened and why. A verdict of guilty or not guilty is ascertained through an evaluation of the facts of the case. On the other hand, penalty deliberations begin after a guilty verdict has been specified. There, evidence about what happened is secondary. Instead, the jurors are required to determine the punishment that the particular defendant deserves (Costanzo & Costanzo). After a capital defendant is convicted and the trial enters the penalty phase, the State will argue to the jury that the defendant should receive a sentence of death due to the presence of at least one aggravating factor. The defense will argue and present evidence of one or more mitigating circumstances, asserting that this evidence should mitigate against a death sentence for a life sentence instead (Luginbuhl & Middendorf, 1988).

In the Bowers, Sandys, and Steiner (1998) study, many jurors referred to their experiences during the guilt stage of the trial when explaining their reasons for taking a stand on punishment before the sentencing stage of the trial. They reported that early pro-life jurors stated that the jury's deliberations on guilt had shaped their position on the defendant's punishment; whereas, pro-death jurors more frequently pointed to the presentation of evidence during the guilt phase. The early pro-death jurors were quick to decide that the defendant was guilty of capital murder and were pretty sure of themselves. Nearly nine out of ten (88.1%) early pro-death jurors stated that they thought the defendant was guilty before beginning deliberations. Conversely, fewer than half (44.9%) of the early pro-life jurors had decided before deliberations on guilt that the defendant was guilty of capital murder.

Thus, it is evident that various factors affect guilt and penalty phases of capital trials. First, extending the work of Smith and Medin (1981), Hans (1988) surmised that

the penalty decisions of jurors involve a prototype-matching strategy. This strategy holds that jurors possess general prototypes of criminals who deserve to be executed for their crimes. The prototypes might well be influenced by celebrated cases (i.e. Charles Manson or Ted Bundy). The match between the defendant and the prototype subsequently commands the decision to recommend life or death.

Second, the Bowers et al. (1998) study revealed three basic themes occurred during guilt deliberations concerning punishment: the temptations and pressures to talk about the defendant's punishment during guilt deliberations; the dynamics of pro-death influences and advocacy in these discussions; and the character of pro-life influences and arguments. Many jurors reported that the issue of punishment arose during guilt deliberations but said they tried to resist temptation, but not all jurors were able to do so. Some jurors thought that a capital murder verdict meant the death penalty, either because they thought the law mandated it or because they thought it the right thing to do. The jurors' discussions during guilt deliberations of the prosecution's voir dire questioning, of the trial judge's charging instructions, and of statutory "special circumstances" appeared to reinforce a mistaken impression that death was legally just. In some instances, all or most jurors had decided by the time of guilt deliberations that they would not vote for the death penalty, stating that it was not appropriate for the specific crime or for the specific defendant.

Third, as mentioned in the Bowers et al. study (1998), research investigating the comprehensibility of death penalty instructions also provides evidence of very poor comprehension of legal instructions by jurors (e.g., Haney & Lynch, 1994, 1997; Haney, Sontag, & Costanzo, 1994; Luginbuhl, 1992; Lynch & Haney, 2000; Wiener, Prichard, &



Weston, 1995), which inevitably contributes to mistaken and inappropriate decisions in capital cases. In other words, the jury instructions which govern capital penalty-phase decision-making are no more comprehensible than others (Lynch & Haney). Perhaps the unique nature of this stage of a capital trial may even exacerbate the problem of comprehension. In short, the current study will demonstrate that capital penalty phase instructions, with its legalese (i.e. mitigators, aggravators, unanimity, and weighing), may, in fact, superimpose juror confusion rather than refine this uniquely subjective decision-making-process.

### Emerging Role of Pattern Instructions

In all jury trials in the United States, the closing phase of the trial consists of the judge's delivery of instructions to the jury. The judge, as the authority on the rules of law in the case, must inform the jury, the final decision maker in matters concerning the facts in the case, on the law relevant to its decision. Moreover, in criminal trials, the jury's instructions include a description of the elements that must be proved if the defendant is to be found guilty. For example, the jury in a murder case would be told the legal definitions of various types of homicide and the findings of fact that intimate each type of homicide. Further, the instructions include a general commentary on how the jury is to regard the evidence (i.e. what issues are and are not to be considered in deciding whether a witness is credible) and instructs on how convinced the jury must be in order to reach a verdict (i.e. beyond a reasonable doubt) (Lind, 1982). In addition, the instructions generally define what is and what is not evidence, point out the chief issues, present the applicable law, and describe the function of the jury (Forston, 1975).

The specific instructions furnished to the jury are usually left to the discretion of the trial judges; however, they may consult with the attorneys in the case. Over the last several decades, though, there has been a movement to use “pattern” or standardized instructions, which are written by judicial or bar groups to cover the most common trial situations and issues (Elwork, Alfini, & Sales, 1982; Kerr & Bray, 1982). However, Nieland (1979) noted that the development of pattern instructions was brought about in part by a desire to simplify the process of selecting appropriate jury instructions for lawyers and judges and in part by a desire to reduce appellate court caseloads precipitated by claimed error in jury instructions. Nonetheless, as far back as 1930, commentators have criticized jury comprehension of instructions. Jurist Jerome Frank stated that the words spoken to the jury by the judge might as well be a foreign language (Frank, 1930, p. 181).

In an attempt to reduce appeals originating in instruction error, pattern instructions have apparently had poor success (Severance & Loftus, 1982). Nieland (1978) analyzed 2,049 Illinois Supreme Court cases between 1956 and 1973 to assess the success of pattern instructions. Nieland found that the standardized instructions had no reliable effect in reducing the total number of appeals, the number of times instructional errors were raised on appeal, or the number of reversals and retrials granted in the Illinois Supreme Court. Data, however, from Arkansas and New York as well as Illinois suggest that standardized instructions may reduce the number of reversals based on specific allegations that the law was incorrectly stated (Nieland). Unfortunately, however, pattern instructions still have one principal weakness. Although the instructions have been

prepared to be legally accurate, little thought has been contributed to making them understandable to the average juror (Elwork, Sales, & Alfini, 1977).

### Rejection of Mandatory Sentencing

Before the *Furman* decision in 1972, juries typically received no guidance informing them how to reach a decision in capital cases. They received information about the defendant and the offense and then decided whether death was the appropriate sentence. Thus, in *Furman*, the Supreme Court concluded that the unguided practices of the states were yielding death penalty decisions that were arbitrary or unprincipled. In fact, Justice Stewart compared the death sentence to a bolt of lightning, finding that “the defendants selected for capital punishment were a capriciously selected random handful of those whose conduct was equally reprehensible, most of whom did not receive a sentence of death” (*Furman v Georgia*, 1972, p. 310). Therefore, North Carolina and Louisiana both passed mandatory death sentences on all of those defendants convicted of particular offenses or of particular offenses committed under specified conditions (i.e. murder for hire) in their attempt to fulfill the obligations of *Furman*. The Court held, however, that these mandatory statutes violated the Eighth Amendment. Instead, the Court concluded that a case-by-case determination was required to guarantee that death was the appropriate punishment for that specific case. The difficulty with the schemes developed by *North Carolina* and *Louisiana* was the effect of eliminating individualized consideration and, instead, substituting automatic death sentences for particular offenses, with no regard to the character or record of the individual defendant or the circumstances

of the particular offense. Consequently, they were rejected as unconstitutional (*Roberts v Louisiana*, 1976; *Woodson v North Carolina*, 1976).

### Implementation of Guided Discretion

Subsequent decisions followed that renounced mandatory sentencing and endorsed the notion of guided discretion (*Gregg v Georgia*, 1976; *Jurek v Texas*, 1976; *Proffitt v Florida*, 1976). These cases established sentencing schemes that would, through legal instructions, tell the jury what factors had to be found if a defendant was to be sentenced to death and would leave the jury with discretion to consider any relevant case or offender characteristics that might lead to the conclusion that capital punishment was not appropriate. Thus, the Court, in essence, held that states could constitutionally execute offenders if they instructed juries properly about the factors they were to consider and the way those factors were to be weighed, because such instructions would produce rational and consistent death penalty determinations.

### Conceptualization of Terminology

The bifurcation of the capital trial into separate guilt and sentencing phases is the most conclusive and uniform change in the administration of capital punishment under the statutes approved in *Gregg v Georgia* (1976) and companion cases (Bowers et al., 1998). In accordance with the law, jurors make the life or death decision at a separate penalty phase after guilt has been determined as detailed by the sentencing instructions. These instructions were created in order to guide jurors through the death penalty

decision-making process as well as the exercise of sentencing discretion by articulating those aggravating and mitigating considerations that are relevant to this decision. By doing so, the verdicts, surmised by the Court, would be regulated and made consistent, shielded from racial bias, and rendered constitutional. Unfortunately empirical evidence suggests that these instructional safeguards have failed to remedy the problems identified in *Furman* (e.g., Gross & Mauro, 1989). Many Supreme Court decisions have culminated over time the foundation to follow when making capital decisions and as is demonstrated below, various terms have been addressed by the Court in an attempt to refine the penalty phase proceedings.

#### Aggravating Circumstances

In the penalty phase, jurors are first presented with evidence relating to aggravating features of the murder that might justify the death penalty (Hans, 1988). According to Haney and Lynch (1994, p. 420), "aggravating means to willfully or consciously commit a crime" or "the defendant intentionally tried to commit the crime with prior knowledge of the circumstances." Moreover, aggravation in relation to the statute means worsening but in laymens terms means annoying and neither aggravation nor mitigation is defined by the statute (Diamond, 1993). The common meaning of an "aggravating" circumstance, then, is entirely different from the legal definition, which refers to something concerning the crime which makes it more serious than an ordinary murder or something about the defendant that justifies putting him to death (Tiersma, 1995).

The "trigger" for any death sentence is the determination of at least one aggravating circumstance. Without it, a death sentence can not be imposed in Tennessee and most other states. Death penalty states vary in the number of aggravating circumstances listed in their statutes. Connecticut has the fewest with 7; Delaware has the most with 22 (Acker & Lanier, 1998). Enumerated in state statutes, these aggravating circumstances usually include the defendant's past history of violent criminal conduct, the existence of more than one killing, and the commission of a murder while in the process of committing another felony such as robbery or rape (Hans, 1988).

Although the aggravating requirement, like the mitigating requirement, was intended to reduce death-eligibility, it has not done so very well (Bohm, 1999). Steiker and Steiker (1998, p. 57) stated, "States have adopted, and the Court has sustained, aggravating circumstances that arguably encompass every murder." Accordingly, research demonstrates that "virtually all persons sentenced to death in Georgia before *Furman* would have been deemed death eligible under Georgia's post-*Furman* statute" (Steiker & Steiker, p. 58).

One of the first tests concerning aggravating circumstances was *Godfrey v Georgia* (1980). The Court held that the aggravating factor under which Godfrey had been sentenced to death was too broad and vague; and, subsequently, reversed the death sentence. His offense, according to the specifics of the statute, was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of the mind, or an aggravated battery to the person." The problems were that the trial judge did not explain the meaning of the aggravating circumstance to the jury, and the Georgia Supreme Court

did not apply a clarifying interpretation of the meaning it had developed in previous cases.

In *Barclay v Florida* (1983), the central issue was whether a non-statutory aggravating circumstance, specifically racial hatred in this case, was admissible. Barclay was a member of the Black Liberation Army, whose purpose was "to kill white persons and to start a revolution and a racial war." The Court upheld the death sentence, signifying that the sentencing authority may consider virtually any aggravating factor (that is properly brought before it) once it has determined at least one statutory aggravating circumstance exists.

### Mitigating Circumstances

One of the changes to death penalty statutes approved by the Court in *Gregg* was the requirement that sentencing authorities consider mitigating circumstances before determining the sentence. The issue of mitigation is of great importance to the fair administration of capital sentences because mitigation is literally the only thing at the final stage of a capital trial that stands between a capital defendant and the death sentence (Haney & Lynch, 1994). Nonetheless, in *People v McLain* (1988), a penalty phase jury sent the court a note asking for definitions of aggravation and mitigation. The court responded with a note: "Are you asking for the ordinary definition of those terms or whether there is a legal definition? If you are asking for the latter, there is no legal definition of these terms. They are to be given there [sic] commonly accepted and ordinary meaning" (*People v McLain*, 1988, p. 580). The jury then sent another note that said: "Being unfamiliar with the term of mitigation we would like the dictionary meaning

of both mitigation and aggravation, please" (p. 580). In short, this was an admission by the jury, themselves, that none of them understood the term "mitigation."

Responding to these requests, though, the court provided the following definitions: "Aggravation: An act or circumstance that makes more serious or more severe...Mitigation: An act or circumstance that makes less serious or less severe." The California Supreme Court held that the lower court had not erred in providing these definitions (*People v McLain*, 1989, p. 580-81).

The first challenge on this issue came in 1978 in the cases of *Lockett v Ohio* and *Bell v Ohio*. In those cases, the issue was whether defense attorneys could present only mitigating circumstances that were listed in the death penalty statute. The Court held that trial courts must allow any mitigating circumstances that a defense attorney presents, and not just those enumerated in the statute. Later the Court reinforced that juries may not refuse to consider any relevant mitigating evidence, even non-statutory mitigating circumstances (*Hitchcock v Dugger*, 1987).

In 1988, in *Mills v Maryland*, the Court considered jury instructions that required the jury to be unanimous in its finding of a mitigating circumstance. In other words, before a juror could "weigh" a mitigating circumstance against an aggravating circumstance, all 12 members of the jury had to agree that the mitigating circumstance did exist. The Court ruled that jury unanimity on the presence of a mitigating circumstance is not required before an individual juror can weigh it against aggravating factors. The issue was addressed again in *McKoy v North Carolina* (1990), and the Court held that sentencing instructions, which prevent the jury from considering any mitigating factor-even those not found to be unanimous-violated the Eighth Amendment. In other



words, the Court held that the sentencing instructions must clearly relate to the jurors that mitigating factors need not be found unanimously.

As recently as 1989, the Court ruled that the “absence of instructions informing the jury that it could consider and give effect to the mitigating evidence” offered by a defendant could result in a death sentence reversal (*Penry v Lynaugh*, 1989, p. 328). A year later, the Court stated that the requirement of individualized capital sentencing “is satisfied by allowing the jury to consider all relevant mitigating evidence” (*Blaystone v Pennsylvania*, 1990, p. 308).

Even still, there seems to be a general agreement among litigators and death penalty scholars concerning the inadequate description of the concept of mitigation in the instructions themselves, which could lead jurors to overlook what might represent compelling reasons to render a life verdict (e.g., Geimer, 1990-91; Haney & Lynch, 1994; White, 1987), not to mention the ability of capital juries to apply the concept to penalty phase evidence (Haney & Lynch). If jurors do not understand the concept of mitigation or if the instructions are not clear on how to define mitigators or how to implement mitigating evidence into the decision-making process, then, allowing defendants to present such evidence and assuming that juries heed the evidence may be an unavailing undertaking. For example, Blankenship et al. (1997), found that only 58.2% of the sample understood what a mitigator was, while 72.9% said they knew what an aggravating circumstance was after reading the instructions. The present study specifically addressed the issue of mitigating evidence and jurors’ ability to discern the requirements for mitigation as well as the requirement for weighing mitigators against aggravators and the ability to comprehend non-enumerated mitigators.

### Unanimity Requirement

Jurors must be unanimous in their finding of any aggravating factor (*State v Kirkley*, 1983). However, this requirement does not apply to mitigating factors. As a result of *McKoy* (1990) and *Mills* (1988), any juror who believes that a mitigating factor exists is allowed to consider that factor in her/his final decision on life or death.

It is imperative that the sentencing instructions convey this message to the jurors, for there are crucial consequences if the difference is not correctly understood (Luginbuhl & Howe, 1995). If, for example, jurors think that in order to consider mitigating evidence, they must be unanimous, then, chances are likely that the evidence would not be considered. Thus, an inaccurate sentence of death could possibly be given. Such a decision would also be a direct violation of *McKoy* (1990) and *Mills* (1988).

### Process of Weighing Mitigators Against Aggravators

The court has said that each juror must “weigh” mitigating and aggravating circumstances on his or her own moral scales (*People v Milner*, 1988), that jurors are the judges of the weight to be given to the aggravating and mitigating circumstances they deem present in the case, and that it is error for a trial court to instruct jurors to decide the fate of the defendant by taking into account beliefs which are based on the community at large (i.e. *People v Harrison*, 1963). This principle is based on the theory that the process enacts the “conscience of the community.” However, Krauss (1989, p. 651) pointed out that “the balancing process is left to each juror’s individual discretion, and it is the presumption that juries are a microcosm of the community that leads the law to view jury

verdicts as expressions of community values.” In sum, the procedure by which jurors are supposed to weigh the aggravating and mitigating factors is often left unclear by the confusing language in the instructions that describe them (Eisenberg & Wells, 1993; Haney & Lynch, 1997; Luginbuhl & Burkhead, 1994; Wiener, Pritchard, & Weston, 1995).

### History of Jurors' Comprehension of Sentencing Instructions

Debates concerning the impact of guided discretion statutes raised a related issue of whether jury decision-making can be sufficiently guided by judicial instructions (Hans, 1988). Subsequently, countless studies have shown that jurors routinely do not understand the instructions they are presented or, at best, have limited understanding of them (e.g., Blankenship et al., 1997; Buchanan et al., 1978; Charrow & Charrow, 1979; Elwork et al., 1982; Elwork et al., 1977; Frank & Applegate, 1998; Garvey, Johnson, & Marcus, 2000; Haney & Lynch, 1994; Haney, Sontag, & Costanzo, 1994; Hastie et al., 1983; Luginbuhl, 1992; Reifman, Gusick, & Ellsworth, 1992; Rose & Ogloff, 2001; Severance & Loftus, 1982; Steele & Thornburg, 1988; Strawn & Buchanan, 1976). Perhaps, this limited understanding was best described by Weltner (1979, p. 20):

The jury system, at its bedrock, proceeds upon the idea that it is possible to inform 12 persons about the principles of law to such extent that they are able to remember and apply the law to the facts as they find them from the evidence. Whoever first conceived that proposition was basically out of touch with reality. It is fatuous to suppose that every jury of 12 untutored people can listen to, remember and accurately apply principles of law-however complex-as they are expounded by the judge.

Furthermore, consider for a moment how well a group of lawyers and criminal justice professors would perform if given a thirty minute lecture on how to perform an appendectomy and then were immediately tested on their comprehension (Strawn & Buchanan). Assume further that during the lecture, a multitude of the words used were jargon to the medical profession and were not explained in the lecture (Strawn & Buchanan). In short, the research appears to describe juries who are ill-advised of their required duty but nonetheless are sitting in judgment of defendants' ability to live or die. The following headings set forth the introduction of a plethora of research which serves to confirm at least some of the reasons that the various researchers referred to above have given for the absence of understanding of pattern jury instructions.

### Technical Language

Technically accurate statements of the law are a significant problem for criminal defendants because of the ambiguity and possibility of misinterpretation of the sentencing instructions by jurors (Severance et al., 1984, see, e.g., Charrow & Charrow, 1979; Elwork et al., 1977, 1982; Strawn & Buchanan, 1976). Misunderstanding arises from the syntax of the instructions, the manner of presentation, or the general unfamiliarity of lay people with legal terminology (Severance et al.). As a result, many researchers have investigated whether jurors understand the charging instructions and have reached the same conclusion: typical pattern jury instructions, drafted by lawyers to be legally precise, were incomprehensible to jurors (Reed, 1980). For example, Forston (1973) found that after hearing instructions, 80% of his subjects still did not understand basic rules of evidence and the burden of proof.

Misunderstanding is also evidenced in Geimer and Amsterdam's (1988) study in Florida that surveyed a minimum of three jurors from 10 different capital trials. It was determined that juries that enforce death sentences tend to maintain a "presumption of death," a belief that they should employ a sentence of death unless convinced otherwise. Moreover, some jurors reported that they thought a death verdict was actually mandatory.

Haney et al. (1994) remarked that half of the juries from the California juror panel studied had requested further clarification of the sentencing instructions from the trial judge after they had been read. Further, one California juror described the dilemma with which many capital juries find themselves:

The first thing we asked for after the instruction was, could the judge define mitigating and aggravating circumstances. Because the different verdicts that we could come up with depended on if mitigating outweighed aggravating, or if aggravating outweighed mitigating, or all of that. So we wanted to make sure. I said, 'I don't know that I exactly understand what it means.' And then everybody else said, 'No, neither do I,' or 'I can't give you a definition.' So we decided we should ask the judge. Well, the judge wrote back and said, 'You have to glean it from the instructions' (Haney et al., 1994, p. 169).

Of the 30 California jurors interviewed, only 13 showed reasonably accurate comprehension of the concepts of aggravating and mitigating. Moreover, within the same study, only 2 of the 24 Oregon jurors interviewed were able to accurately recall all three of the sentencing questions posed to them in the judge's charge.

Luginbuhl and Howe (1995) found similar results from eighty-three jurors who had served in capital trials in North Carolina. Roughly one half (48%) of the jurors incorrectly believed that they could consider as an aggravating factor any factor that made the crime worse. Only about one third (36%) of the jurors correctly understood that they were to use only the aggravating factors mentioned in the specific list. Also, one half

(48%) of the jurors incorrectly believed that they could have considered non-enumerated aggravating circumstances, one fourth (26%) incorrectly believed that aggravating factors needed only to be proven by a preponderance of the evidence or to the satisfaction of the juror.

Comprehension was worse when considering mitigating factors. While more than one half (59%) of the jurors were aware that they could entertain any evidence they desired as a mitigating factor, under one half (47%) correctly understood that mitigating factors did not require proof beyond a reasonable doubt. Similarly, less than one half (47%) of the jurors were aware that unanimity was not required to find the existence of mitigating factors, while a similar percentage (42%) incorrectly believed that unanimity was required (e.g., Luginbuhl, 1992).

Research suggests that there is a wide-spread problem in jurors' being able to determine the difference between, or even the definitions of, aggravators and mitigators, specifically with mitigators (e.g., Costanzo & Costanzo, 1992; Haney & Lynch, 1994, 1997). Haney and Lynch (1997) discovered that while 71% of the subjects studied were able to provide at least a partially correct definition of the term "aggravating," only 52% could do so for "mitigating." Furthermore, only 41% of the subjects involved could provide at least a relatively correct definition for both aggravation and mitigation.

### Schemas

Some researchers have suggested that the concept of schemata greatly affects a jurors' ability to render a just verdict. A schema, as referred to in this case, is a person's expectation about how an event should proceed. Such a schema can be based on many

factors, such as past experience, shared cultural knowledge, and the media (Luginbuhl, 1992). Several studies (Cohen, 1981; Darley & Gross, 1983; Higgins & McCann, 1984) have argued that a person will recall and interpret events in a manner that parallels his or her schema unless deflections from the schema are pronounced (Luginbuhl). In other words, preexisting schemas can influence how jurors perceive, store into memory, and recall information, as well as help shape their access to and reliance on such information throughout the decision-making process (Diamond, 1993; Fiske & Taylor, 1991; Haney, 1997). Thus, it is evident the importance of clear and concise sentencing instructions to combat individuals' personal beliefs and standards.

#### Timing of Sentencing Instructions

Yet another point of poor juror comprehension of the law has been determined to be the timing of the instructions (Elwork et al., 1977; Heuer & Penrod, 1989; Kassin & Wrightsman, 1979; Reifman et al., 1992; Schwarzer, 1981; Strawn & Munsterman, 1982). The assumption behind this timing has been that by instructing the jury just before deliberations, the instructions can be easily recalled (Heuer & Penrod). Attorneys sometimes make references to the laws discussed in the instructions periodically through the trial, but it is not until the conclusion of the trial that the judge instructs the jurors to the technicalities of the laws involved in the case. Further, it is not until the conclusion of the penalty phase that jurors hear the instructions in their entirety (Luginbuhl & Howe, 1995). Usually, the jurors have listened to days, perhaps weeks, of testimony, including arguments by counsel, without knowing what their requirements are and how they are supposed to go about making such serious decisions. Obviously, if jurors make their

decision as the evidence is being disseminated, as research suggests, a charge at the end of the trial is a bit too late to have an effect on the verdict.

However, it has been noted that some researchers have found that giving preliminary instructions either have no effect or decrease comprehension (Cruse & Browne, 1987; Elwork et al., 1977; Greene & Loftus, 1985). Cruse and Browne (1987) gave subjects a full set of instructions and found that it made no difference on verdicts whether they were given before or after the evidence. Elwork et al. found that instructions given at the end of the trial actually improved comprehension as compared to being given in the beginning, but the effect on verdicts was not measured.

Nevertheless, one point upon which most researchers agree is that repeating the instructions two or more times aids in comprehension and improves accuracy of the verdicts (Cruse & Browne, 1987; Elwork et al., 1977; Forston, 1975; Heuer & Penrod, 1989; Strawn & Munsterman, 1982). Forston suggested that ideally instructions should be given not only at the beginning, but also periodically throughout the trial as appropriate. Cruse and Browne also determined that giving a full set of standard instructions twice significantly increased verdict accuracy. Heuer and Penrods' study found that preliminary instructions did assist the jurors with following legal guidelines in their decision making. Kassin and Wrightsman (1979) stated that subjects who received the instructions before the evidence produced a low rate of conviction because they actually viewed the defendant as less likely to have committed the crime.

### Summary



As can be seen by the results of the above studies, juror-sentencing instructions and the interpretations of them definitely maintain some severe flaws. In fact, it can be said that many individuals are currently sitting on death row or have already been executed that were convicted by persons not truly understanding the breadth of their deed. Furthermore, the current study is simply a part of a growing plethora of empirical research that has determined across the country that the common layperson just does not understand even the most common principles required in rendering a just and equitable verdict in a capital case. Meanwhile, despite the misunderstanding of the law, juries from all over continue to make the decision to send individuals to death row.

## CHAPTER 3

### METHODOLOGY

The purpose of this research was to expand on the work of Blankenship et al. (1997) by assessing the ability of jurors' comprehension of revised death penalty sentencing instructions. Prior research in this area suggests that many juries convict individuals of capital murder and sentence them to death despite extensive levels of misunderstanding of the guiding instructions provided them by the court. Other studies have shown that through re-wording of instructions comprehension level increases significantly. This thesis will explore whether a revised set of death penalty instructions actually improves juror understanding at a level beyond chance.

#### Procedures for Collecting Data

##### Subjects

Subjects were individuals from Shelby County, Tennessee who had been summoned for jury duty in that county. Approximately every two weeks, a new jury pool is randomly selected from the population of prospective jurors in Shelby County (Blankenship et al., 1997). The questionnaire was administered to volunteers producing 201 usable questionnaires. The sample consisted of 124 (62%) females and 73 (36%) males, including 4 (2%) missing cases, and 62 (31%) Blacks, 130 (65%) Whites, and 1 (.5%) Hispanic, with 8 (4%) missing cases.

Prospective jurors were surveyed in a waiting room where individuals sit and wait to be summoned. Volunteers were given a packet of material that contained the questionnaire, along with verbal instructions as to the purpose of the survey. Respondents

were asked to read a brief introduction and then to respond to some preliminary questions. The sentencing instructions were read aloud as well as provided in the questionnaire so that they could follow along. The prospective jurors then answered a series of questions that assessed their understanding of the sentencing instructions. Respondents were able to refer to their copy of the written instructions at any time during completion of the questionnaire.

Aside from the fact that the instructions were read aloud during the second phase of the study (an audio tape was played during the initial study), no other facet of the study changed between the two phases of the survey except that the original sentencing instructions were revised (see Appendix B) in order to determine if juror comprehension could be improved. After reading the revised sentencing instructions, respondents replied to the same questions posed to respondents in the initial study.

### Apparatus

Data for this study were collected in 1993 from a questionnaire conducted in Shelby County, Tennessee. The questionnaire contained a copy of the written revised instructions, which addressed a number of issues different from the original study. The revised sentencing instructions were approved for accuracy by Bill Reddick a capital case attorney. The changes consisted primarily of: (1) restating the requirement that the jury must be unanimous in finding the existence of an aggravating circumstance or circumstances, that the state bears the burden of proving aggravating circumstances beyond a reasonable doubt, and that the jury is limited to statutorily enumerated aggravating circumstances (page 5 of questionnaire); (2) restating the requirement that if

any juror or jurors believed that the State had failed to meet its obligation with regard to proving the existence of aggravating circumstances, then the jury could not consider that aggravating circumstance, and if no aggravating circumstance is proven to exist, the jury is required to return a sentence of life imprisonment (middle of page 6 of questionnaire); (3) the phrase mitigating circumstance was defined and examples were provided (top of page 7 of questionnaire); (4) the requisite that jury unanimity is not required for finding the existence of mitigating circumstances was emphasized (middle of page 7 of the questionnaire); (5) the requirement that any juror or jurors can consider non-enumerated mitigating circumstances was emphasized (middle of page 7 of the questionnaire); and (6) some guidance was given to assist jurors in the process of weighing mitigating against aggravating circumstances (bottom of page 7 of the questionnaire).

## Variables

### Level of Understanding Measures

Most prior research focuses on other various aspects of sentencing instructions when considering level of understanding. These include intent, burden of proof, presumption of innocence, reasonable doubt, using prior conviction, and/or definition of crime (e.g., Buchanan et al., 1978; Severance et al., 1984; Severance & Loftus, 1982, 1984). Others, however, look at random issues such as testing juror understanding of their duties and responsibilities as jurors as well as points of law relating to the case (e.g., Elwork et al., 1982). More recently, though, researchers have begun looking at the importance of aggravating and mitigating circumstances in relation to the understanding of sentencing instructions (e.g., Diamond & Levi, 1996; Haney & Lynch, 1994;

Luginbuhl, 1992; Luginbuhl & Howe, 1995; Luginbuhl & Middendorf, 1988). However, research examining in-depth effectiveness of sentencing instructions in explaining aggravators and mitigators is very limited. Thus, this research attempted to assess jurors' comprehension of aggravating and mitigating circumstances as well as the concept of unanimity and weighing.

Jury Unanimity on Existence of Mitigating Circumstances. Prospective jurors were presented with four scenarios (see Appendix C) that assessed jurors' level of understanding on whether or not the jury panel must be unanimous when determining the existence of mitigating circumstances. After each scenario, participants were asked "Did the juror (or jury) follow the law?" The response categories were "yes," (scored as 1) "no," (scored as 2) or "don't know" (scored as 3). The correct response for each scenario is reported in Appendix C. The scenarios are as follows: (1) The defendant was only 25 years of age when he committed the murder. A juror decides that the defendant's age is a mitigating circumstance. However, the other 11 jurors disagree and insist that his age is not a mitigating circumstance. This one juror believes that she cannot consider a mitigating circumstance unless the entire jury unanimously agrees that it exists. She therefore votes for the death penalty. (2) One juror decides from the evidence that the defendant cooperated with the police. The same juror decides that the defendant's cooperation is a mitigating circumstance. The other 11 jurors argue that such cooperation cannot be considered because they do not all agree that it is a mitigating circumstance. The one juror decides to consider the defendant's cooperation with the police as a mitigating circumstance, despite the disagreement with the other 11 jurors. (3) Eleven

jurors decide from the evidence that the defendant was abused as a child. The same 11 jurors decide that this history of child abuse is a mitigating circumstance. One juror disagrees that such abuse is a mitigating circumstance. Because the jurors cannot unanimously agree that being abused as a child is a mitigating circumstance, they do not consider it any further. (4) One juror decides from the evidence that the defendant was good to his family. This one juror decides that this is a mitigating circumstance. The 11 other jurors disagree. They insist that no juror should consider the defendant's good relations with his family as a mitigating circumstance unless all 12 jurors agree that it is a mitigating circumstance. As a result, the one juror does not consider the defendant's being good to his family as a mitigating circumstance.

Jury Unanimity on Mitigating Circumstances Outweighing Aggravating Circumstances. This concept was assessed based upon the following five scenarios (5-9) (see Appendix C), with possible responses of "yes" (scored as 1), "no" (scored as 2), and "don't know" (scored as 3): (5) A juror decides that the fact that the defendant did not directly kill the victim is a mitigating circumstance that outweighs the aggravating circumstances. He is the only juror to believe this, and he votes against imposing the death penalty. (6) Every juror agrees that the defendant was mentally disturbed at the time of the crime. The jurors also agree that this is a mitigating circumstance. However, not all jurors agree that this mitigating circumstance outweighs the aggravating circumstances they have found. The jury, therefore, votes unanimously to impose the death penalty. (7) A juror believes that the mitigating circumstance of the defendant being mentally retarded outweighs the aggravating circumstances. He is the only juror to

feel this way, and because of his feelings he votes to impose a life sentence. (8) A juror decides from the evidence that the defendant had no significant history of prior criminal activity. The same juror concludes that this lack of prior criminal activity is a mitigating circumstance that outweighs the aggravating circumstances, and the juror votes not to impose the death penalty. (9) Eleven jurors believe that the defendant's mental disturbance at the time the crime was committed is *not* a mitigating circumstance. One juror believes that the defendant's mental disturbance *is* a mitigating circumstance. That same juror decides that the mental state of the defendant outweighs the aggravating circumstances found by the jury, even though none of the other jurors do. The juror votes for life, even though the other jurors tell him that is improper.

Comprehension of Non-Enumerated Mitigating Circumstances. The level of understanding of non-enumerated mitigating circumstances was measured using the following two scenarios (10-11) (see Appendix C) with possible responses of "yes" (scored as 1), "no" (scored as 2), and "don't know" (scored as 3): (10) The jury hears evidence that the defendant was well-behaved as a boy. They also believe that this is mitigating evidence. However, one juror notes that being a good child is not one of the mitigating circumstances that the judge specifically mentioned. For this reason, she concludes that she cannot consider this as a mitigating circumstance. (11) The jury decides from the evidence that the defendant felt great remorse for committing the murder. They also decide that remorse is a mitigating circumstance, even though remorse was not one of the mitigating circumstances specifically mentioned by the judge. In

deciding whether to impose a life sentence or the death penalty, they consider the defendant's remorse as a mitigating circumstance anyway.

The Standard for Proving the Existence of Mitigating Circumstances. The current study also viewed jurors' level of comprehension when determining the standard for proving the presence of mitigating factors. This concept was assessed using the following two scenarios (12-13) (see Appendix C), with possible response categories of "yes" (scored as 1), "no" (scored as 2), and "don't know" (scored as 3): (12) The jury hears evidence that the defendant cooperated with the police. The jury agrees that this is mitigating evidence, but they do not believe it has been proven beyond a reasonable doubt. The jury therefore does not consider the defendant's cooperation as a mitigating circumstance. (13) The jury hears evidence that the murder was especially heinous, atrocious or cruel. Being especially heinous, atrocious, or cruel is an aggravating circumstance under the statute. However, the jury does not believe that the cruelty of the crime has been proven beyond a reasonable doubt. The jury, therefore, does not consider the cruelty of the crime as an aggravating circumstance.

Mitigating Circumstances Outweigh Aggravating Circumstances. How one determines the methodology for outweighing aggravators with mitigators is significant in determining whether or not jurors are appropriately convicting defendants of capital murder. Thus, this concept was analyzed using the following four scenarios (14-17) (see Appendix C), with possible responses of "yes" (scored as 1), "no" (scored as 2), and "don't know" (scored as 3): (14) The jury finds the existence of three aggravating



circumstances and only two mitigating circumstances. Because the jury counted more aggravating circumstances than mitigating circumstances, the jury votes to impose the death penalty. (15) The jury finds that one aggravating circumstance exists and that no mitigating circumstances exist. They, therefore, decide they must vote to impose a sentence of death. (16) The jury unanimously agrees that the murder was especially heinous, atrocious, or cruel. They also agree that this is an aggravating circumstance, and that it is not outweighed by the mitigating circumstances that exist as they interpret the instructions, this means they must vote to impose the death penalty, and they do so. (17) A juror considers all the evidence and comes to the conclusion that the mitigating circumstances, taken together, outweigh the aggravating circumstances and that death is not the appropriate punishment. However, he cannot find any individual mitigating circumstance that outweighs the aggravating circumstances. Therefore, the juror votes to impose the death penalty.

#### Demographic/Background Characteristics

Gender. Participants were instructed to report their sex based on the options of "male" (scored as 1) and "female" (scored as 2).

Race. The racial or ethnic background of each participant was determined along the following scale: "Black" (scored as 1), "White" (scored as 2), "Hispanic" (scored as 3), "Asian" (scored as 4), and "other" (scored as 5).

Age. Respondents were asked in what year they were born. Their age was calculated by subtracting the year they were born from the year the data were collected - 1993.

Education. This item was determined by asking each subject the highest grade he/she had completed. Responses were "< than high school" (scored as 1), "high school/GED" (scored as 2), "associate/junior/community college" (scored as 3), "bachelor's" (scored as 4), and "graduate" (scored as 5).

Income. This variable was measured by asking the subjects to which group their total family income from all sources fell for the previous year before taxes. The options were as follows: "under \$5,000" (scored as 1); "\$5,000-\$9,999" (scored as 2); "\$10,000-\$19,999" (scored as 3); "\$20,000-\$29,999" (scored as 4); "\$30,000-\$39,999" (scored as 5); "\$40,000-\$49,999" (scored as 6); "\$50,000-\$59,999" (scored as 7); "\$60,000-\$69,999" (scored as 8); "\$70,000 and over" (scored as 9).

Religious Orientation. This item assessed participants' religious affiliation by asking them their religious preference. The options were as follows: "Protestant" (scored as 1); "Catholic" (scored as 2); "Jewish" (scored as 3); "Other, please write in" (scored as 4); and "None" (scored as 5). If respondent checked "protestant," he/she was instructed to answer the next question that asked for the specific protestant denomination he/she most closely associated with. The options were as follows: "Baptist" (scored as 1); "Southern Baptist" (scored as 2); "Church of Christ" (scored as 3); "Methodist" (scored as 4);

"Lutheran (other than Missouri Synod)" (scored as 5); "Episcopal" (scored as 6); "Presbyterian" (scored as 7); and "Other, please write in" (scored as 8).

Political Ideology. Responses for this item were generated by asking the subject to check which best described their political views. The options were as follows: "very liberal" (scored as 1); "liberal" (scored as 2); "middle-of-the-road" (scored as 3); "conservative" (scored as 4); "very conservative" (scored as 5).

#### Procedures for Treating Data

Because the current research was more of a policy implications' study, the statistical analysis was purposefully kept simple in order for the common lay person to have an in-depth understanding of what occurred in the study. The first phase of data analysis involved the examination of frequency distributions for the respondents' demographic characteristics. A distribution of characteristics was reported for the entire sample. This allows the researcher to obtain a clear picture of the sample by reporting the characteristics of each respondent.

In the second phase of the study, proportions were used comparing the two samples, original instructions' responses from sample one to revised instructions' responses from the current study, sample two. The possible responses for each scenario (1-17) were: "yes," "no," and "don't know." Thus, for each scenario (1-17), the correct response was evaluated based upon the proportion that answered the question correctly. Then, a z score was obtained for the difference of proportions for the correct answer for

each scenario to determine whether the difference was based upon mere chance or whether the difference was statistically significant.

The z score was the most feasible statistical test to use in an analysis of this type for a number of reasons. The z-test requires that the sample come from a normal distribution; the standard deviation of the population must be known; independence of sampling is required; and the measurement scale of data must be at least interval. Also, a large sample size is required for this type of statistical analysis.

### Conclusion

This chapter examined how research was conducted by describing the questionnaire and the procedure used for collecting and evaluating the data. Next, the variable measures (e.g., level of understanding measures and demographic characteristics) were discussed; whereby each variable was assessed and explained. Then, the types of analyses conducted were described. The results of the analysis are presented in the following chapter.

## CHAPTER 4

### ANALYSIS OF DATA

The purpose of the research was to assess the juror comprehension of capital sentencing instructions after significant revisions were made from original sentencing instructions. This task was accomplished in the current research by revising the sentencing instructions focusing on the following areas: carefully restating certain statements of importance, defining particular jargon to improve clarification, and giving additional guidance as to the process jurors must follow when deliberating. Then, jurors were asked to answer a set of scenarios that measured different areas of comprehension. As previously noted, data were analyzed by first examining the percentages of correct responses to each scenario and then comparing them to the first sample in the study. Blankenship et al., (1997) found in the first sample that significant numbers of jurors do not understand the original instructions, written by the State of Tennessee. A z-score was then obtained for the correct response for each scenario to determine if the improvement, or lack thereof, from the first sample in the study that used the original instructions to the second sample that used revised instructions was statistically significant or, rather, simply a chance improvement. The results of the statistical tests are discussed in the following pages.

#### Characteristics of the Respondents

Information on a variety of characteristics of each respondent was collected for the sample of the first part of the study, which included 495 respondents (see Table 1),

and the second sample, which included 201 respondents (see Table 1). A clear majority of the respondents (315 or 64%) were female and 36% (176) were male in sample one. Likewise, the current sample consisted of more females (124 or 63%) than males (73 or 37%). More than half (291 or 60%) of the first sample were White with 187 (39%) Blacks. Similarly, the clear majority of the current sample was White (130 or 67%) whereas 32% (62) were Black. The mean age of the respondents in the first study was 41, with ages ranging from 20 to 66. Additionally, the mean age of the respondents of the current study was 41, with ages ranging from 20 to 67.

A majority of the first sample (169 or 36%) had a high school diploma or G.E.D., 25% (116) had an associates degree, 23% (107) had a bachelor's degree, 11% (53) had a graduate degree, and 5% (21) had less than a high school education. Twenty-nine percent (56) of the current sample had an associates degree, 28% (53) had a high school diploma or G.E.D., 26% (50) had a bachelor's degree, 17% (33) had a graduate degree, and less than one percent (1) had less than a high school education.

Fourteen percent of the first sample (61) of respondents reported a total family income of \$20,000-\$29,000, and 14% (60) had a total family income of \$30,000-\$39,000. Thirty-two percent (55) of the respondents in the current study reported a total family income of \$70,000-\$79,000.

Seventy-nine percent (358) of the respondents in the first study reported Protestant as their religious preference. Catholic denomination was second (38 or 8%). Of the 358 Protestants, 43% (152) reported their denomination as Baptist, and 15% (55) Methodists followed as a distant second. A clear majority of the current sample (141 or 78%) reported a religious preference as being Protestant, with Catholics following a close

second (22 or 12%). Of the Protestants, a majority reported Baptist (61 or 44%). A majority of the first sample (155 or 35%) reported a conservative political ideology and 31% (137) reported a middle-of-the-road political ideology. Thirty-nine percent (69) of the current sample reported a political ideology of conservative and 38% (68) reported middle-of-the-road, with only 9% (16) liberal and 2% (3) very liberal. In the first sample of the study, only two (.4%) respondents reported having previously served on a death penalty jury. Currently, only one (.5%) juror reported they have previously served on a death penalty jury.

Table 1

## Characteristics of the Sample

<u>Variable</u>	<u>First Sample (n=495)</u>		<u>Second Sample (n=201)</u>	
	<u>Frequency</u>	<u>Percentage</u>	<u>Frequency</u>	<u>Percentage</u>
Gender				
Male	176	35.6	73	37.1
Female	315	63.6	124	62.9
Race				
White	291	60.1	130	67.4
Black	187	38.6	62	32.1
Asian	3	.6	0	00.0
Hispanic	2	.4	1	.5
Age				
20 to 30	64	13.0	25	12.6
31 to 40	172	35.4	75	38.2
41 to 50	164	33.8	56	28.6
51 to 60	67	13.7	29	14.7
61 to 66	19	3.8	11	5.5
	(Mean=41)		(Mean=41)	
Education				
< Than H.S.	21	4.5	1	.5
H.S. or G.E.D.	169	36.3	53	27.5
Associates	116	24.9	56	29.0
Bachelors	107	23.0	50	25.9
Graduate	53	11.4	33	17.1
Total Family Income				
Under \$5000	18	4.1	1	.6
\$5000-\$9999	19	4.3	6	3.4
\$10000-\$19999	40	9.1	11	6.3
\$20000-\$29999	61	13.9	23	13.2
\$30000-\$39999	60	13.6	21	12.1
\$40000-\$49999	56	12.7	23	13.2
\$50000-\$59000	56	12.7	12	6.9
\$60000-\$69000	46	10.5	22	12.6
\$70000-\$79000	84	19.1	55	31.6

Table Continues



Table 1 continued

<u>Variable</u>	<u>First Sample (n=495)</u>		<u>Second Sample (n=201)</u>	
	<u>Frequency</u>	<u>Percentage</u>	<u>Frequency</u>	<u>Percentage</u>
Religious Preference				
Protestant	358	78.9	141	77.9
Catholic	38	8.4	22	12.2
Jewish	7	1.5	2	1.1
Other	32	7.0	8	4.4
None	19	4.2	8	4.4
Protestant Denomination				
Baptist	152	42.6	61	44.2
Southern Baptist	54	15.1	17	12.3
Church of Christ	28	7.8	9	6.5
Methodist	55	15.4	18	13.0
Lutheran	7	2.0	2	1.4
Episcopal	17	4.8	5	3.6
Presbyterian	18	5.0	11	8.0
Other	26	7.3	15	10.9
Political Ideology				
Very Liberal	24	5.4	3	1.7
Liberal	82	18.3	16	9.0
Middle-of-the-road	137	30.6	68	38.2
Conservative	155	34.6	69	38.8
Very Conservative	50	11.2	22	12.4
Juror in Death Penalty Case				
Yes	2	.4	1	.5
No	483	99.6	198	99.5

## Measuring Juror Comprehension

### Jury Unanimity on Existence of Mitigating Circumstances

Tennessee sentencing instructions state that the jury must be unanimous in finding an aggravating circumstance but the instructions do not mention a similar requirement for mitigating circumstances (Blankenship et al., 1997). Scenarios 1 through 4 measure comprehension of this concept in many ways. In Scenarios 1 and 4, a juror believes that she cannot consider evidence as a mitigating circumstance unless the other members agree unanimously; this assumption is incorrect. Scenario 3 reverses the situation where 11 jurors agree on the existence of a mitigating circumstance but the twelfth juror disagrees. The law is misapplied when the jury fails to consider the evidence. In Scenario 2, a juror remains adamant in his decision to consider the evidence as a mitigating circumstance in spite of the disagreement with the other 11 jurors; this single juror's response is correct.

Table 2 indicates that a significant proportion of the sample in the first part of the study had trouble understanding the concept of jury unanimity when considering mitigating circumstances. The results show that 37.4% of the sample either answered incorrectly or indicated that they did not know on the correct response to Scenario 1, the scenario in this group in which they did the best. On the question in which the respondents did the worst, Scenario 4, 60.1% of the sample answered incorrectly or did not know.

For the second sample in the study, Table 2 indicates a significant improvement on all scenarios of juror understanding concerning jury unanimity of mitigating

circumstances. Respondents scored highest on Scenario 1; whereby, 78.3% of the sample answered the question correctly. The results also reveal a significant increase in comprehension in Scenario 4 in that 59.9% of the sample answered the question correctly, as compared to only 39.9% in the first part of the study. Scenarios 2 and 3 were found to be significant in the improvement of comprehension as well.

Table 2

Jury Unanimity on Existence of Mitigating Circumstances (Percentages)

Scenario	Original	Revised	Original	Revised	Original	Revised	Z Score Correct Response
	Yes	Yes	No	No	DK	DK	
1	27.8	14.6	62.7 <sup>a</sup>	78.3 <sup>a</sup>	9.6	7.1	-3.95**
2	42.6 <sup>a</sup>	69.3 <sup>a</sup>	42.6	18.7	14.8	12.0	-6.37**
3	33.5	20.1	51.1 <sup>a</sup>	70.6 <sup>a</sup>	15.3	9.3	-4.63**
4	46.8	33.0	39.9 <sup>a</sup>	59.9 <sup>a</sup>	13.3	10.1	-3.98**

<sup>a</sup> Denotes correct response.

\*\*significant at  $\alpha = .05$ , one-tailed test.

Jury Unanimity on Mitigating Circumstances Outweighing Aggravating Circumstances

Tennessee sentencing instructions do not give jurors direction about unanimity regarding the existence of mitigating circumstances; however, they state that the jury must be unanimous in determining that a mitigating circumstance outweighs the aggravating circumstance (Blankenship et al., 1997). Scenarios 5, 7, 8, and 9 measure this issue by presenting a juror who believes the evidence supports the existence of a mitigating circumstance that outweighs the aggravating circumstance. A significant

majority of the respondents from both waves of the study consistently answered this set of questions correctly.

Table 3 indicates that comprehension was quite good in determining unanimity of mitigators outweighing aggravators for sample one of the study. Seventy-one percent of the participants answered Scenarios 5 and 7 correctly. Scenario 8 was answered correctly by 70.5% of the respondents. Scenario 6, the worst question of the group, was still answered correctly by nearly half (47.6%) of the sample.

Sample two of the study was comparable to sample one in that comprehension was quite good on this set of questions. Table 3 indicates that comprehension still improved somewhat from sample one, however. Scenarios 7, 8, and 9 were all significant in improvement of comprehension regarding unanimity of the weighing process, with 79.5%, 77.9%, and 71.4% answering correctly respectively. The results indicate that when the instructions thoroughly explain an issue, the comprehension rate is higher than when the instructions are less clear or contain omissions, as in the case of jury unanimity on the existence of mitigating circumstances (Blankenship et al., 1997).

Table 3

Jury Unanimity on Mitigating Circumstances Outweighing Aggravating Circumstances  
(Percentages)

Scenario	Original	Revised	Original	Revised	Original	Revised	Z Score Correct Response
	Yes	Yes	No	No	DK	DK	
5	70.9 <sup>a</sup>	72.2 <sup>a</sup>	19.3	18.2	9.8	9.6	-.342
6	42.9	44.6	47.6 <sup>a</sup>	48.2 <sup>a</sup>	9.4	7.2	-.142
7	70.9 <sup>a</sup>	79.5 <sup>a</sup>	21.9	14.9	7.2	5.6	-2.29**
8	70.5 <sup>a</sup>	77.9 <sup>a</sup>	21.5	16.8	8.0	5.3	-1.95**
9	63.5 <sup>a</sup>	71.4 <sup>a</sup>	22.5	20.6	12.0	8.0	-1.92**

<sup>a</sup> Denotes correct response.

\*\*significant at  $\alpha = .05$ , one-tailed test.

Comprehension of Nonenumerated Mitigating Circumstances

*Lockett v Ohio* (1978) states that any evidence can be considered mitigating; thus, Tennessee's sentencing instructions assert that jurors are not limited to enumerated mitigating circumstances (Blankenship et al., 1997). Scenarios 10 and 11 measure participants' ability to understand examples of nonenumerated mitigating circumstances. When jurors are given little or no guidance, as discussed earlier, they tend to have difficulty in applying the law, and the results in Table 4 support this conclusion. In the first sample of the study, only 26.3% answered Scenario 10 correctly, and only 37.8% answered Scenario 11 correctly.

However, for the second sample used in the study, a more detailed explanation on mitigators was included, giving participants additional information on the term.

Therefore, the second sample resulted in dramatically different results. Table 4 indicates that 45.9% answered Scenario 10 correctly and 53.5% answered Scenario 11 correctly, a significant improvement from the first part of the study.

Table 4

Comprehension of Nonenumerated Mitigating Circumstances (Percentages)

Scenario	Original	Revised	Original	Revised	Original	Revised	Z Score Correct Response
	Yes	Yes	No	No	DK	DK	
10	66.1	43.9	26.3 <sup>a</sup>	45.9 <sup>a</sup>	7.6	10.2	-5.03**
11	37.8 <sup>a</sup>	53.5 <sup>a</sup>	51.6	37.4	10.6	9.1	-3.65**

<sup>a</sup> Denotes correct response.

\*\*significant at  $\alpha = .05$ , one-tailed test.

The Standard for Proving the Existence of Mitigating Circumstances

For the jury to find the existence of any aggravating circumstance, that circumstance must be proven beyond a reasonable doubt, and must be done so to every single juror. Thus the state in proving aggravating circumstances is held to the highest legal standard-proof beyond a reasonable doubt and unanimity of the jury. Proving the existence of mitigators is not held to the same standard. A mitigating circumstance must be proven only to the juror's satisfaction (Blankenship et al., 1997; Luginbuhl, 1992). However, the sentencing instructions provide no direction as to the level of proof required for proving the existence of a mitigating circumstance (Blankenship et al.).

Table 5 indicates that in the first sample in the study, 78.5% of the respondents either answered Scenario 12 incorrectly or did not know how to determine the level of

proof required for proving the existence of a mitigating circumstance. Additionally, 35.3% answered Scenario 13 incorrectly or did not know.

Table 5 also indicates that comprehension of Scenario 12 remained a problem: only 39.5% of the sample answered correctly. However, it was still a significant improvement from sample one. On the other hand, Scenario 13 was answered correctly by 73.3% of the sample, a significant increase from sample one. Again, this is an indicator that when jurors receive adequate instructions, comprehension improves. Likewise, the evidence also supports the conclusion that insufficient instructions limit jurors' ability to correctly interpret the law.

Table 5

The Standard for Proving the Existence of Mitigating Circumstances (Percentages)

Scenario	Original	Revised	Original	Revised	Original	Revised	Z Score Correct Response
	Yes	Yes	No	No	DK	DK	
12	64.2	49.2	21.5 <sup>a</sup>	39.5 <sup>a</sup>	14.3	11.3	-4.29**
13	64.7 <sup>a</sup>	73.3 <sup>a</sup>	26.9	20.4	8.4	6.3	-2.32**

<sup>a</sup> Denotes correct response.

\*\*significant at  $\alpha = .05$ , one-tailed test.

Process of Weighing Mitigating Against Aggravating Circumstances

The sentencing instructions necessitate that jurors first determine the existence of an aggravating circumstance. If jurors unanimously agree that an aggravator exists, they are required to then determine if a mitigator exists. If only one juror believes a mitigating circumstance exists, he/she must determine if the mitigator outweighs the aggravator.

Again, the instructions do not mention how to guide jurors in the process of weighing one set of circumstances against the other (Blankenship et al., 1997).

According to the first sample of the study in Table 6, 41.8% of the sample answered Scenario 14 incorrectly. In other words, 41.8% of the participants thought it was proper to sum up each set of circumstances and then vote on the basis of which "side" had the higher total. Responses to Scenario 17 indicate confusion about the weighing process: 31.8% of the sample incorrectly believed that an individual mitigating circumstance must outweigh all the aggravating circumstances.

Scenarios 15 and 16 infer participants' ability to comprehend the law as it relates to aggravating circumstances. Unless a mitigator outweighs the aggravator(s), the jury is required to vote a sentence of death. Table 6 demonstrates that 72.9% and 82.8% of the sample (respectively) understood the instructions. Once again, these results suggest that when the instructions are clear and unambiguous, jurors are able to interpret the law appropriately.

In the second sample, Scenario 14 shows significant improvement from the first part of the study, with 64.4% of the sample answering the question correctly, indicating that additional explanation in the sentencing instructions cleared some of the ambiguity. Scenarios 15 and 16 were nearly comparable to the previous sample, 74.3% and 82.9% respectively answered the questions correctly. However, Scenario 17 displayed some improvement with 59.1% answering correctly but was not a significant progression from sample one.



Table 6

## Weighing Mitigating Against Aggravating Circumstances (Percentages)

Scenario	Original	Revised	Original	Revised	Original	Revised	Z Score Correct Response
	Yes	Yes	No	No	DK	DK	
14	41.8	26.3	47.7 <sup>a</sup>	64.4 <sup>a</sup>	10.5	9.3	-3.98**
15	72.9 <sup>a</sup>	74.3 <sup>a</sup>	19.0	16.6	8.1	9.1	-.37
16	82.8 <sup>a</sup>	82.9 <sup>a</sup>	8.5	10.7	8.7	6.4	-.03
17	31.8	28.5	53.3 <sup>a</sup>	59.1 <sup>a</sup>	14.9	12.4	-1.35

<sup>a</sup> Denotes correct response.

\*\*significant at  $\alpha = .05$ , one-tailed test.

### Summary

In sum, 12 of the 17 scenarios indicated significant improvement in the second sample that used the revised sentencing instructions. The results indicate that juror comprehension of the law and their ability to accurately interpret the law increases when the instructions are clear and concise. Additionally, the probability is such that a significant proportion of jurors, when using the original instructions given by the state of Tennessee, do not fully understand much of the terminology used in the instructions, and thus are not accurately following the law as it is written and intended to be carried out. More importantly, participants in the current study revealed a consistent bias across the scenarios that was to the defendants disadvantage. In short, when errors were made, jurors were more likely to send a defendant to death row.

## CHAPTER 5

### DISCUSSION

Prior research has shown that revised instructions produce a higher level of comprehension among jurors concerning the law and its application (e.g., Luginbuhl, 1992; Severance & Loftus, 1982, 1984). Severance and Loftus (1982) found that errors in comprehension were consistently lower when revised rather than pattern instructions were provided. Further, they determined that revised instructions led subjects to agree more strongly with correct applications of specific legal concepts than did pattern instructions. Moreover, the study provided that more legally knowledgeable respondents were more likely to acquit in the case.

Severance and Loftus (1984) established that psycholinguistic changes in pattern sentencing instructions can improve jurors' abilities to comprehend and apply jury instructions. The most significant result was the effect of the overall improvement in participants' abilities to apply the instructions after receiving revised instructions rather than pattern or no instructions.

Luginbuhl's (1992) study used a revised set of instructions that focused on mitigating circumstances. Additional explanations were provided to the North Carolinian respondents as to the requirements needed for determining the existence of mitigators and of the decision rules for the final determination of life versus death. He determined that subjects' understanding of the decision criteria used in determining the existence of mitigating circumstances, as well as the role played by mitigating circumstances in the final decision regarding death, were inadequately understood by those exposed to the old or pattern instructions where an actual defendant was sentenced to death. Thus, it appears

that unless the legal decision rules are clearly defined in the sentencing instructions, jurors are likely to misunderstand the legal criteria for deciding the existence and role of mitigating circumstances, which ultimately enhances the likelihood that a defendant will be wrongly sentenced to death.

Blankenship et al. (1997) tested juror comprehension of Tennessee sentencing instructions and determined that comprehension is better when the instructions are clear and concise. Conversely, when the instructions omit serious points regarding the law, jurors' comprehension is extremely limited. This is evident in jurors' understanding of aggravators versus mitigators. Tennessee sentencing instructions are much clearer and concise on the issue of aggravating circumstances whereby specific aggravators are delineated. However, the instructions are much less clear on the issue of mitigating circumstances. Thus, Blankenship et al. found that 58.2% of their sample believed they knew what a mitigator was compared to 72.9% who said they knew what an aggravator was after reading the instructions.

Frank and Applegate (1998), using a sample from Ohio, also concluded that juror comprehension increased significantly for those participants who were exposed to the rewritten instructions. Furthermore, the jurors who heard the new instructions and also had access to a written copy of the instructions correctly answered the greatest number of questions.

The current study also assessed improvement in juror comprehension with revised sentencing instructions, focusing more attention on understanding of mitigators and aggravators. To test improvement, a follow up study to the first sample conducted by Blankenship et al. (1997) was officiated. An identical questionnaire to the first sample

was used; whereby, jurors read and answered scenarios relating to principles of the sentencing instructions. A copy of the revised instructions was provided in the questionnaire. The present study's findings were comparable to and consistent with prior research concerning the ability to improve sentencing instructions.

Jury unanimity on the existence of mitigating circumstances proved problematic in the first sample in the study. After additional explanation in the revised instructions of the second sample, jurors displayed a marked improvement of level of understanding of this issue. However, jury unanimity of weighing mitigators against aggravators seemed a little clearer to the respondents than determining the existence of mitigators. Indeed this was thought to be the case due to the detail provided in the original pattern instructions, which clearly states that the jury must be unanimous in determining that a mitigating circumstance outweighs the aggravating circumstance. Thus, a significant majority of participants in both waves of the study consistently answered this set of questions correctly.

Because little or no guidance is given in the original instructions concerning nonenumerated mitigating circumstances, participants in the first sample of the study showed low comprehension on questions measuring this concept. However, the revised instructions used in sample two provided a lengthier explanation of the issue that resulted in increased comprehension compared to the first sample.

The standard for proving the existence of a mitigating circumstance is much lower than that of an aggravating circumstance. Again, the original sentencing instructions do not provide any direction as to the level of proof required for proving the existence of a mitigating circumstance. Thus, the majority of the sample in the first part of the study

displayed a very low comprehension level of this issue, but sample two provided an improvement of comprehension.

Finally, the current study found that jurors maintained a higher level of understanding of the process of weighing mitigating circumstances against aggravating circumstances as compared to the first sample of the study. However, the level of improvement was not significant, which indicates that additional information is needed in explaining the meaning of this issue.

### Limitations of the Study

In light of the findings, this study consisted of a number of limitations that may have an unknown effect on the results and, thus, cannot be overlooked. First, the sample was somewhat small and limited to one county in Tennessee. Therefore, findings may have been the result of some unknown systematic bias limiting their generalizability to the entire population. However, numerous prior studies have found consistent results lending support to the current study.

Another factor is that jurors did not deliberate as jurors. Thus, the participants were not exposed to the pressures of being part of the adjudication process and, so, did not possess any information about a specific defendant (Hans, 1988; Severance & Loftus, 1982). Moreover, actual jurors might become somewhat more familiar with the legal terminology if participating in an actual trial. In other words, jurors typically have the trial as their source for the facts of a case, but only the instructions as the source of law. Nonetheless, Diamond (1993) states that the testing approach that most accurately provides for assessing juror comprehension of judicial instructions involves the

presentation of a set of instructions and an immediate assessment of juror comprehension, offered by the current study and used in the *Free* (1992) case.

Lastly, death eligible and ineligible jurors were not evaluated separately, which could have a profound effect on the results. Participants who are death eligible or ineligible, for that matter, believe so strongly in their position concerning the death penalty that their answers to the questions may become skewed because of such strong opinions. In other words, one overlooks the law as it is stated to fit with his/her personal belief system.

However, despite these limitations, the study provides evidence that juror comprehension of sentencing instructions is lacking and that understandability can be improved. As such, the results presented here challenge whether the discretion of jurors is being adequately guided as the U.S. Supreme Court indicated in earlier findings (e.g., *Gregg v Georgia*, 1976; *Jurek v Texas*, 1976; *Profitt v Florida*, 1976). If it is not, which has been demonstrated by the inadequate instructions, then the critical role of jurors in the sentencing phase of death penalty cases needs to be reexamined.

### Policy Implications

The literature on jury comprehension consistently demonstrates that sentencing instructions used during the penalty phase of a capital trial are in desperate need of improvement, and the evidence presented here reveals that Tennessee is no exception. However, social science research largely tends to be ignored, especially in appellate courts (Tanford, 1991). Tanford found that appellate courts have instead moved in the direction contradicted by empirical data. He states that appellate courts actually now

require less effective instruction procedures despite data suggesting how to improve the procedures. This coincides with a growing body of research that establishes that courts tend to feign ignorance of social science data and actually prefer to base laws on expediency, precedent, and intuition (Haney, 1980; Lempert, 1988; Saks & Baron, 1980; Tanford, 1991).

Acker (1991) found significant use of social science research in U.S. Supreme Court capital punishment cases. He found that death penalty cases reflect greater citation and discussion of social science data than many other Supreme Court criminal decisions. However, the majority of citations occurred in dissenting opinions and with a few exceptions, justices typically ignore research findings presented during capital punishment cases. Thus, the U.S. Supreme Court's review of jury instructions has been close-minded. According to the Court, the jury trial system depends on the "crucial assumption...that juries will follow the instructions given by the trial judge" (*Parker v Randolph*, 1979, p. 73).

Appellate review of jury instructions has tended to focus on the extent to which instructions reflect the law, scrutinizing instructions for legal accuracy while ignoring jury comprehensibility. In many cases where appellate courts have acknowledged jury misunderstanding, the courts will accept the mistake, not rendering the error great enough to reverse (Cho, 1994). For example, in *Sellers v United States* (1979), the jurors misunderstood a self-defense instruction and found the defendant guilty of homicide. However, jurors later stated that they would have acquitted the defendant if they had understood the instruction. The court refused to reverse the verdict.

In *Gacy v Welborn* (1993), the court gave little concern to a juror comprehension study suggesting that jurors did not adequately understand the Illinois death penalty pattern instructions. Admittedly, the court conceded that difficulties with the instructions that reduce the quality of “justice” existed (p. 314) but nonetheless resigned itself to the imperfections of the system. “[E]ven [a] ‘simplified’ charge would leave many jurors dumbfounded...As there are no perfect trials, so there are no perfect instructions” (p. 314).

In the aforementioned cases, courts assumed that jurors will follow the law as they are instructed, accepted errors as minor glitches in the system, and conceded that the law is so complicated that even a simplified version would confuse the average layman. In other words, courts tend to confuse the trial as being the source of the law instead of the source of the facts of the case. Therefore, the courts continue to ignore the empirical data that suggest jurors do not understand the sentencing instructions presented to them in capital cases. Further, they continue to ignore data that demonstrate an unequivocal improvement in comprehension when additional information is provided in the instructions.

### Future Research

Future research into alternative avenues of improving juror comprehension of sentencing instructions is not limited to those variables used in the current research. In fact, there are many facets to the juror instruction process that have yet to be tested thoroughly enough to make a compelling argument that these alternatives do improve comprehension. It has been suggested that the best way to redress comprehension



difficulties in jury instructions includes a collaboration among attorneys and/or judges, psychologists, and linguists (Diamond & Levi, 1996). Possible improvements that need further testing include but are not limited to, timing of the reading of instructions, providing a written copy of instructions, and using closing arguments to supplement instruction to the jury, all of which are designed primarily to yield recall.

It has been shown that providing jurors with the instructions at the beginning of the trial, instead of only at the end of the trial, helps jurors to better distinguish the evidence as it is presented and to later recall it (Elwork et al., 1977; Strawn & Munsterman, 1982). Also, preinstruction allows for better organization of evidence. Research has shown that recall is improved when one has an overall organization system (Bransford & Johnson, 1972). Likewise, it has been found that preliminary instruction does assist the juror with following legal guidelines in their decision making (Heuer & Penrod, 1989).

Weltner stated that “the written charge is an absolute essential to a modern judicial system” (Weltner, 1979, p. 22). He further stated that if juries are reliable enough to determine if a defendant lives or dies based on an oral charge, it must also be trusted to read a charge, which can be referred to as often as needed for improved understanding. Written instructions could reduce disputes among jurors debating specific issues. Comprehension could also be improved by having a tangible copy of the instructions in front of them at all times.

Lastly, penalty phase arguments could be used to supplement and clarify judicial instructions by defining some of the critical terms of capital punishment cases, to categorize specific factors to be weighed by jurors in reaching their verdicts, and to better

delineate the process of decision making in a capital case (Haney & Lynch, 1997). Of course, none of these suggestions will assure 100% comprehension. However, these suggestions used simultaneously along with improved clarification of central terminology could possibly significantly increase comprehension.

Another avenue to pursue in order to assure qualified jurors' are sitting in judgement of defendants is that of more competent capital defense attorneys. These attorneys need better training in jury selection and summation. Further, increased funds for providing expert witnesses in capital cases should be considered. In doing so, jurors are better exposed to points of the law that may prove to be confusing in the sentencing instructions. Thus, comprehension levels have the potential to increase.

### Conclusion

This research suggests that jurors do not understand judicial sentencing instructions in capital punishment cases, but comprehension can be improved by including additional clarification in the instructions. The current findings are added evidence that lawmakers need to investigate thoroughly the possibility of amending the judicial sentencing instructions so that average laypersons better understand their required duty when sitting on a jury panel. Moreover, this research draws increased attention to the fact that defendants are consistently being sentenced to death by jurors who do not correctly understand the law as it was meant to be applied. This and other research could potentially benefit court officials, lawmakers, and defendants alike, because those upheld to carry out judgment could be better informed, thus, decreasing possible grounds for appeal and eliminating some of the back log of the court system.

Furthermore, those persons convicted of crimes will receive a more constitutionally fair trial.

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## APPENDICES

### Appendix A. Original Death Penalty Instructions

Members of the Jury, you have now found the defendant guilty of Murder in the First Degree as charged in the indictment.

It is now your duty to determine within the limits prescribed by law, the penalty which shall be imposed as punishment for this offense. Section 39-2404 provides that upon a trial for Murder in the First Degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix the punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment.

In arriving at this determination, you are authorized to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilt finding phase or the sentencing phase or both. The Jury are the sole judges of the facts, and of the law as it applies to the facts in the case. In making up your verdicts, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.

The burden of proof is upon the State to prove any statutory aggravating circumstances or circumstances beyond a reasonable doubt to a moral certainty.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdicts. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by law but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the verdicts. The law makes you, the Jury, the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence. The law heretofore submitted to you, the Jury, is hereby incorporated in this charge as was given to you in the guilt finding phase and you may refer to these instructions in your deliberations.

### **Credibility of Witnesses**

You will take all of the evidence adduced in the case by the State and the defendant and give it a full, fair and impartial consideration. If there are any conflicts in the statements of the different witnesses, it is your duty to reconcile them, if you can, for the law presumes that every witness has sworn to the truth; but, if you cannot, the law makes you the sole and exclusive judges of the credibility of the witnesses and the weight to be given their testimony. In forming your opinion as to the credibility of a witness, you

may look to the proof, if any, of his general character, the manner and demeanor of the witness, the consistency or inconsistency of his statements, their probability or improbability, his ability and willingness to speak the truth, his intelligence and means of knowledge, his motive to speak the truth or swear to a falsehood, his interest or lack of interest in the outcome of the trial.

When the defendant makes himself a witness in his own behalf, his credibility is to be determined by the same rules that the credibility of other witnesses is determined, and you will give to the defendant's testimony in the case such weight as you may think it entitled to.

### **Impeaching a Witness**

There are several modes of impeaching a witness. One mode is to prove by credible witnesses that they know the general character of the assailed witness and from that general character they would not believe him on oath in a Court of justice. The fact that the character of the witness is assailed by a single witness, casts a reproach upon him and when the general character of the witness is assailed upon the one hand and sustained upon the other by witnesses, it then becomes a question to be decided upon by the Jury like all other questions of fact and is not to be judged by the number of witnesses for or against but by the respectability, intelligence, consistency and means of information.

Another mode is to prove that a witness has, at different times, made conflicting statements as to material facts of the case as to which he testifies. Still another mode is by rigid and close cross-examination to involve the witness in contradictions and discrepancies as to the material facts stated by him. Immaterial discrepancies or differences in the statements of witnesses do not affect their credibility unless there is something to show that they originated in a willful falsehood and, you, gentlemen of the Jury, are to determine how far the testimony of any impeached witness has been impaired by any invalidating process.

The Jury are the sole judges of the facts. Expert witnesses have been allowed to testify as to certain matters of issue in this case, and to state this opinion. With reference to this testimony, which you should consider and judge alone with all the other proof, the Court charges you that it should be received with caution. While this kind of testimony is sometimes the only means, or the best way to reach the truth, yet it is largely a field of speculation, beset with pitfalls and uncertainties, and requires patient and intelligent consideration to reach the truth. You should give it the same consideration as all the other proof, governed by the same rules to arrive at the truth, as you are governed by in your consideration of all the proof.

Section 39-2404, Sub-section (i), Tennessee Code Annotated, provides that no death penalty shall be imposed by a Jury but upon an unanimous finding of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

1. The Murder was committed against a person less than twelve years of age and the defendant was eighteen years of age or older.
2. The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.
3. The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.
4. The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.
5. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

The Court further instructs you as to the meaning of:

"Heinous" means extremely wicked or shockingly evil.

"Atrocious" means outrageously wicked and vile.

"Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

6. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.
7. The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.
8. The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.
9. The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.
10. The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general, or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office.
11. The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

Section 39-2404, Subsection (j), Tennessee Code Annotated, provides that in arriving at the punishment, the Jury shall consider as heretofore indicated, any mitigating circumstances which shall include but not be limited to the following:



1. The defendant has no significant history of prior criminal activity;
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
3. The victim was a participant in the defendant's conduct or consented to the act;
4. The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;
5. The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;
6. The defendant acted under extreme duress or under the substantial domination of another person;
7. The youth or advanced age of the defendant at the time of the crime;
8. The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. The Jury shall state in writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify in writing that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found.

As to each specific defendant, you will write your findings and verdicts on the enclosed forms attached hereto and made a part of this charge. Your verdicts should be as follows:

- (1) We, the Jury, unanimously find the following listed statutory aggravating circumstance or circumstances;  
(The Jury will then list the statutory aggravating circumstance or circumstances so found beyond a reasonable doubt).
- (2) We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.
- (3) Therefore, we, the Jury, unanimously find that the punishment shall be death.

The verdicts must be unanimous and each Juror must sign their name beneath the verdicts.

If you unanimously determine that no statutory aggravating circumstances has been proved by the State beyond a reasonable doubt; or if the Jury unanimously determine that a statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt; but that said statutory aggravating circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence

shall be life imprisonment. You will write your verdicts upon the enclosed forms attached hereto and made part of this charge.

The verdict should be as follows:

"We, the Jury, unanimously find that the punishment shall be life imprisonment."

The verdict must be unanimous and signed by each Juror.

The Jury in no case, should have any sympathy or prejudice or allow anything but the law and evidence to have any influence upon them in determining their verdicts. They should render their verdicts with absolute fairness and impartiality as they think truth and justice dictate. Take the case, consider all the evidence fairly and impartially and report your verdicts to the Court.

## Appendix B. Revised Death Penalty Instructions

Members of the Jury, you have now found the defendant guilty of Murder in the First Degree as charged in the indictment.

It is now your duty to determine within the limits prescribed by law, the penalty which shall be imposed as punishment for this offense. Section 39-2404 provides that upon a trial for Murder in the First Degree, should the jury find the defendant guilty of Murder in the First Degree, they shall not fix the punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment.

In arriving at this determination, you are authorized to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilty finding phase or the sentencing phase or both. The Jury are the sole judges of the facts, and of the law as it applies to the facts in the case. In making up your verdicts, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.

The burden of proof is upon the State to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt to a moral certainty.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and in an inability, after such investigation, to let the mind rest easily upon the certainty of your verdicts. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by law but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the verdicts. The law makes you, the Jury, the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence. The law heretofore submitted to you, the Jury, is hereby incorporated in this charge as was given to you in the guilt finding phase and you may refer to these instructions in your deliberations.

### **Credibility of Witnesses**

You will take all of the evidence adduced in the case by the State and the defendant and give it a full, fair and impartial consideration. If there are any conflicts in the statements of the different witnesses, it is your duty to reconcile them, if you can, for the law presumes that every witness has sworn to the truth; but, if you cannot, the law makes you the sole and exclusive judges of the credibility of the witnesses and the weight to be given their testimony. In forming your opinion as to the credibility of a witness, you may look to the proof, if any, of his general character, the manner and demeanor of the witness, the consistency or inconsistency of his statements, their probability or improbability, his ability and willingness to speak the truth, his intelligence and means of

knowledge, his motive to speak the truth or swear to a falsehood, his interest or lack of interest in the outcome of the trial.

When the defendant makes himself a witness in his own behalf, his credibility is to be determined by the same rules that the credibility of other witness [sic] is determined, and you will give to defendant's testimony in the case such weight as you may think it entitled to.

### **Impeaching a Witness**

There are several modes of impeaching a witness. One mode is to prove by credible witnesses that they know the general character of the assailed witness and from that general character they would not believe him on oath in a Court of justice. The fact that the character of the witness is assailed by a single witness, casts a reproach upon him and when the general character of the witness is assailed upon the one hand and sustained upon the other by witnesses, it then becomes a question to be decided upon by the Jury like all other questions of fact and is not to be judged by the number of witnesses for or against but by the respectability, intelligence, consistency, and means of information.

Another mode is to prove that a witness has, at different times, made conflicting statements as to material facts of the case as to which he testifies. Still another mode is by rigid and close cross-examination to involve the witness in contradictions and discrepancies as to the material facts stated by him. Immaterial discrepancies or differences in the statements of witnesses do not affect their credibility unless there is something to show that they originated in a willful falsehood and, you, gentlemen of the Jury, are to determine how far the testimony of any impeached witness has been impaired by any invalidating process.

The Jury are the sole judges of the facts. Expert witnesses have been allowed to testify as to certain matters of issue in this case, and to state his opinion. With reference to this testimony, which you should consider and judge along with all the other proof, the Court charges you that it should be received with caution. While this kind of testimony is sometimes the only means, or the best way to reach the truth, yet it is largely a field of speculation, beset with pitfalls and uncertainties, and requires patient and intelligent consideration to reach the truth. You should give it the same consideration as all the other proof, governed by the same rules to arrive at the truth, as you are governed by in your consideration of all the proof.

Section 39-2404, Sub-section (i), Tennessee Code Annotated, provides that no death penalty shall be imposed by a jury but upon unanimous finding of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

1. The Murder was committed against a person less than twelve years of age and the defendant was eighteen years of age or older.

2. The defendant was previously convicted of one or more felonies, other than they present charge, which involve the use or threat of violence to the person.
3. The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.
4. The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.
5. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

The Court further instructs you as to the meaning of:

"Heinous" means extremely wicked or shockingly evil.

"Atrocious" means outrageously wicked and vile.

"Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

6. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.
7. The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.
8. The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.
9. The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.
10. The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general, or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office.
11. The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

The jury may not consider any statutory aggravating circumstance unless all twelve members of the jury unanimously determine, beyond a reasonable doubt, that such aggravating circumstance or circumstances exist. The jury may not consider any factors as aggravating circumstances except those statutory aggravating circumstance(s) it finds the state to have proven beyond a reasonable doubt.

Thus, if any juror or jurors find that the state has not proven a statutory aggravating circumstance beyond a reasonable doubt, the jury shall not weigh that statutory aggravating circumstance in determining the appropriate sentence. However, if all twelve jurors agree that the state has proven a statutory aggravating circumstance beyond a reasonable doubt, the jury shall then weigh the aggravating circumstance when determining the appropriate sentence.

If the jury does not unanimously find that the State has proven any statutory aggravating circumstances beyond a reasonable doubt, the sentence shall be life imprisonment. You will write your verdict upon the enclosed form attached hereto and made a part of this charge.

Section 39-2404, Subsection (j), Tennessee Code Annotated, provides that in arriving at the punishment, if the jury unanimously finds a statutory aggravating circumstance, the Jury must consider any mitigating circumstances which shall include, but which are not limited to, the following:

1. The defendant has no significant history of prior criminal activity;
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
3. The victim was a participant in the defendant's conduct or consented to the act;
4. The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;
5. The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;
6. The defendant acted under extreme duress or under the substantial domination of another person;
7. The youth or advanced age of the defendant at the time of the crime;
8. The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

A mitigating circumstance is any aspect of the defendant's history, background, character or mental state or any circumstance surrounding the criminal offense which, in fairness and mercy, weighs in favor of a life sentence. A mitigating circumstance is any circumstance which provides a reason for imposing a life sentence.

Thus, any evidence that helps to explain the offense, or why the defendant committed the offense may be a mitigating circumstance if such evidence provides a reason why a life sentence is a more appropriate punishment than a death sentence. Any evidence concerning the defendant's background, character, mental state, or personal history is a mitigating circumstance, if such evidence demonstrates a reason why a life sentence is more appropriate than a death sentence in this case.

A mitigating circumstance need not be proven beyond a reasonable doubt. It is not necessary that all twelve jurors agree on the existence of any mitigating circumstance before it may be considered by an individual jurors in determining the appropriate sentence. A mitigating circumstance may be found by any one of you individually so long as there is evidence that shows that they mitigating circumstance exists.

Thus, if any of you find that a particular aspect of the offense or of the defendant's background, character, personal history, or mental state is a mitigating circumstance, and that there is evidence supporting that circumstance, you individually may consider and weight that mitigating circumstance when making your determination whether the appropriate sentence is life or death in this case.

The court listed for you certain statutory mitigating circumstances that you as jurors shall consider when deciding whether life imprisonment or death is the appropriate sentence. This is not an exclusive list of all possible mitigating circumstances which you may consider in this case. Rather, you are free to consider as a mitigating circumstance any aspect of the defendant's character, background or history, or the circumstances surrounding the crime which you find to be mitigating, even if it has not been specifically listed as a possible mitigating circumstance in these instructions. You are not limited to considering only those mitigating circumstances specifically listed. You may find any mitigating circumstance and give it the weight you deem appropriate regardless of whether or not it is one of the listed mitigating circumstances.

When weighing the aggravating circumstances proven beyond a reasonable doubt against mitigating circumstances, you shall not simply count the number of aggravating circumstances and mitigating circumstances. Instead, you shall consider the significance of each aggravating circumstance and the significance of each mitigating circumstance when weighing them to determine the appropriate sentence. For example, it is possible that one mitigating circumstance could outweigh three aggravating circumstances, or that two aggravating circumstances could outweigh three mitigating circumstances.

The weight you assign to any mitigating circumstance shall not depend upon whether or not it has been listed in these instructions. Rather, whether a mitigating circumstance is listed or not, the weight you give that circumstance shall depend on your determination of the significance of that mitigating circumstance.

If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. The Jury shall state in writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify in writing that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found.

As to each specific defendant, you will write your findings and verdicts on the enclosed forms attached hereto and made a part of this charge. Your verdicts should be as follows:

- (1) We, the Jury, unanimously find the following listed statutory aggravating circumstance or circumstances;

(The Jury will then list the statutory aggravating circumstance or circumstances so found beyond a reasonable doubt).

- (2) We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.
- (3) Therefore, we, the Jury, unanimously find that the punishment shall be death.

The verdicts must be unanimous and each Juror must sign their name beneath the verdicts.

If you unanimously determine that no statutory aggravating circumstance has been proved by the State beyond a reasonable doubt; or [sic] if the Jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt; but that said statutory aggravating circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. You will write your verdicts upon the enclosed forms attached hereto and made a part of this charge.

The verdict should be as follows:

"We, the Jury, unanimously find that the punishment shall be life imprisonment."

The verdict must be unanimous and signed by each Juror.

The Jury in no case, should have any sympathy or prejudice or allow anything but the law and evidence to have any influence upon them in determining their verdicts. They should render their verdicts with absolute fairness and impartiality as [sic] they think truth and justice dictate. Take the case, consider all the evidence fairly and impartially and report your verdicts to the Court.



### Appendix C. Survey Questions: Jury Unanimity on Existence of Mitigating Circumstances

1. The defendant was only 25 years of age when he committed the murder. A juror decides that the defendant's age is a mitigating circumstance. However, the other eleven jurors disagree and insist that his age is not a mitigating circumstance. This one juror believes that she cannot consider a mitigating circumstance unless the entire jury unanimously agrees that it exists. She therefore votes for the death penalty. (Correct answer=No)
2. One juror decides from the evidence that the defendant cooperated with the police. The same juror decides that the defendant's cooperation is a mitigating circumstance. The other eleven jurors argue that such cooperation cannot be considered since they do not all agree that it is a mitigating circumstance. The one juror decides to consider the defendant's cooperation with the police as a mitigating circumstance, despite the disagreement with the other eleven jurors. (Correct answer=Yes)
3. Eleven jurors decide from the evidence that the defendant was abused as a child. The same eleven jurors decide that this history of child abuse is a mitigating circumstance. One juror disagrees that such abuse is a mitigating circumstance. Since the jurors cannot unanimously agree that being abused as a child is a mitigating circumstance, they do not consider it any further. (Correct answer=No)
4. One juror decides from the evidence that the defendant was good to his family. This one juror decides that this is a mitigating circumstance. The eleven other jurors disagree. They insist that no juror should consider the defendant's good relations with his family as a mitigating circumstance unless all twelve jurors agree that it is a mitigating circumstance. As a result, the one juror does not consider the defendant's being good to his family as a mitigating circumstance. (Correct answer=No)

### Jury Unanimity on Mitigating Circumstances Outweighing Aggravating Circumstances

5. A juror decides that the fact that the defendant did not directly kill the victim is a mitigating circumstance that outweighs the aggravating circumstances. He is the only juror to believe this, and he votes against imposing the death penalty. (Correct answer=yes)
6. Every juror agrees that the defendant was mentally disturbed at the time of the crime. The jurors also agree that this is a mitigating circumstance. However, not all jurors agree that this mitigating circumstance outweighs the aggravating circumstances they have found. The jury therefore votes unanimously to impose the death penalty. (Correct answer=No)
7. A juror believes that the mitigating circumstance of the defendant being mentally retarded outweighs the aggravating circumstances. He is the only juror to feel this way, and because of his feelings he votes to impose a life sentence. (Correct answer=Yes)

8. A juror decides from the evidence that the defendant had no significant history of prior criminal activity. The same juror concludes that this lack of prior criminal activity is a mitigating circumstance that outweighs the aggravating circumstances, and the juror votes not to impose the death penalty. (Correct answer=Yes)
9. Eleven jurors believe that the defendant's mental disturbance at the time the crime was committed is *not* a mitigating circumstance. One juror believes that the defendant's mental disturbance *is* a mitigating circumstance. That same juror decides that the mental state of the defendant outweighs the aggravating circumstances found by the jury, even though none of the other jurors do. The juror votes for life, even though the other jurors tell him that is improper. (Correct answer=Yes)

#### Comprehension of Non-Enumerated Mitigating Circumstances

10. The jury hears evidence that the defendant was well-behaved as a boy. They also believe that this is mitigating evidence. However, one juror notes that being a good child is not one of the mitigating circumstances that the judge specifically mentioned. For this reason, she concludes that she cannot consider this as a mitigating circumstance. (Correct answer=No)
11. The jury decides from the evidence that the defendant felt great remorse for committing the murder. They also decide that remorse is a mitigating circumstance, even though remorse was not one of the mitigating circumstances specifically mentioned by the judge. In deciding whether to impose a life sentence or the death penalty, they consider the defendant's remorse as a mitigating circumstance anyway. (Correct answer=Yes)

#### The Standard for Proving the Existence of Mitigating Circumstances

12. The jury hears evidence that the defendant cooperated with the police. The jury agrees that this is mitigating evidence, but they do not believe it has been proven beyond a reasonable doubt. The jury therefore does not consider the defendant's cooperation as a mitigating circumstance. (Correct answer=No)
13. The jury hears evidence that the murder was especially heinous, atrocious or cruel. Being especially heinous, atrocious, or cruel is an aggravating circumstance under the statute. However, the jury does not believe that the cruelty of the crime has been proven beyond a reasonable doubt. The jury therefore does not consider the cruelty of the crime as an aggravating circumstance. (Correct answer=Yes)

### Mitigating Circumstances Outweigh Aggravating Circumstances

14. The jury finds the existence of three aggravating circumstances and only two mitigating circumstances. Since the jury counted more aggravating circumstances than mitigating circumstances, the jury votes to impose the death penalty. (Correct answer=No)
15. The jury finds that one aggravating circumstance exists and that no mitigating circumstances exist. They therefore decide they must vote to impose a sentence of death. (Correct answer=Yes)
16. The jury unanimously agrees that the murder was especially heinous, atrocious, or cruel. They also agree that this is an aggravating circumstance, and that it is not outweighed by the mitigating circumstances that exist as they interpret the instructions, this means they must vote to impose the death penalty, and they do so. (Correct answer=Yes)
17. A juror considers all the evidence and comes to the conclusion that the mitigating circumstances, taken together, outweigh the aggravating circumstances and that death is not the appropriate punishment. However, he cannot find any individual mitigating circumstance that outweighs the aggravating circumstances. Therefore, the juror votes to impose the death penalty. (Correct answer=No)

Appendix D. Questionnaire Completed by Participants

**QUESTIONNAIRE**

Please complete the information below.

- A. Have you ever served on a jury before? Yes No

If yes, what kind of cases were the last two you served on?

1. \_\_\_\_\_  
2. \_\_\_\_\_

- B. Have you ever served as a juror on a death penalty case?

Yes \_\_\_\_\_ No \_\_\_\_\_

- C. Please place a check mark [ ✓ ] by the one statement below which best represents your attitude about the death penalty.

- a. \_\_\_\_\_ I strongly favor the death penalty, and would vote for it in all cases of first degree murder.
- b. \_\_\_\_\_ I generally favor the death penalty, but would consider evidence presented that a defendant who had been convicted of first degree murder should not be executed, and would sometimes vote for life imprisonment in such cases.
- c. \_\_\_\_\_ I neither favor nor oppose the death penalty.
- d. \_\_\_\_\_ I generally oppose the death penalty, but would consider evidence presented that a defendant who had been convicted of first degree murder should be executed, and would sometimes vote for death in such cases.
- e. \_\_\_\_\_ I strongly oppose the death penalty, and would never vote for it, even in the worst cases of first degree murder.

- D. If you were a juror in a case where the defendant might get the death penalty, could you be a fair and impartial juror and base your decisions solely on the facts of the case?

Yes \_\_\_\_\_ No \_\_\_\_\_

- E. If you answered "No" to Question D, could you briefly explain.

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- F. In what year were you born? \_\_\_\_\_

- G. What is your gender?

Male \_\_\_\_\_ Female \_\_\_\_\_

- H. What race do you consider yourself?

Black \_\_\_\_\_ White \_\_\_\_\_ Hispanic \_\_\_\_\_ Asian \_\_\_\_\_

Other \_\_\_\_\_ (please write in)

- I. What is the highest educational degree you have earned?

Less than high school  
High school/GED  
Associate/junior/community college  
Bachelor's  
Graduate

### **Background Information**

This questionnaire represents an attempt to determine how well jury instructions convey to jurors the actual meaning of the law that they are to apply in the sentencing stage of a death penalty trial. We do not need to know your identity, so please do not put your name on the questionnaire.

To complete this questionnaire it is necessary to know that a death penalty trial in this state is actually two trials in one, with the same jury hearing both trials; or, as lawyers and judges put it, it is a "bifurcated" trial. The two trials, or the two stages of the bifurcated trial, are: (1) the guilt stage trial, and (2) the sentencing stage trial. A criminal

defendant can be eligible for a death penalty trial only if he is charged with first degree murder. The second trial, the sentencing stage, will occur only if the jury finds the defendant guilty of first degree murder in the first trial, the guilt stage.

In completing this questionnaire, you are to assume that you are on a jury in a death penalty trial in which the defendant is charged with first degree murder. You are also to assume that you have already found the defendant guilty of first degree murder in the guilt stage (the first stage) of the trial, that you have proceeded to the sentencing stage (the second stage), and that you have heard all of the evidence presented by the prosecution and the defense regarding sentencing.

You are now at the point of the sentencing stage of the trial in which the Court instructs you concerning the law that you are to apply to the evidence that you have heard in order to determine whether a sentence of death or life should be imposed against the defendant.

The instructions of the Court for the sentencing stage of the trial are set out below, and after you have read them we ask you to please fill out the attached questionnaire according to the instructions that will be provided you.

Please stop at this point and wait for further instructions. Thank you.

**The Court's instructions prior to deliberation on the question of the sentence of life or death.**

Members of the Jury, you have now found the defendant guilty of Murder in the First Degree as charged in the indictment.

It is now your duty to determine within the limits prescribed by law, the penalty which shall be imposed as punishment for this offense. Section 39-2404 provides that upon a trial for Murder in the First Degree, should the jury find the defendant guilty of Murder in the First Degree, they shall not fix the punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment.

In arriving at this determination, you are authorized to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilty finding phase or the sentencing phase or both. The Jury are the sole judges of the facts, and of the law as it applies to the facts in the case. In making up your verdicts, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.

The burden of proof is upon the State to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt to a moral certainty.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and in an inability, after such investigation, to let the mind rest easily upon the certainty of your verdicts. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by law but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the verdicts. The law makes you, the Jury, the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence. The law heretofore submitted to you, the Jury, is hereby incorporated in this charge as was given to you in the guilt finding phase and you may refer to these instructions in your deliberations.

### **Credibility of Witnesses**

You will take all of the evidence adduced in the case by the State and the defendant and give it a full, fair and impartial consideration. If there are any conflicts in the statements of the different witnesses, it is your duty to reconcile them, if you can, for the law presumes that every witness has sworn to the truth; but, if you cannot, the law makes you the sole and exclusive judges of the credibility of the witnesses and the weight to be given their testimony. In forming your opinion as to the credibility of a witness, you may look to the proof, if any, of his general character, the manner and demeanor of the witness, the consistency or inconsistency of his statements, their probability or improbability, his ability and willingness to speak the truth, his intelligence and means of knowledge, his motive to speak the truth or swear to a falsehood, his interest or lack of interest in the outcome of the trial.

When the defendant makes himself a witness in his own behalf, his credibility is to be determined by the same rules that the credibility of other witness [sic] is determined, and you will give to defendant's testimony in the case such weight as you may think it entitled to.

### **Impeaching a Witness**

There are several modes of impeaching a witness. One mode is to prove by credible witnesses that they know the general character of the assailed witness and from that general character they would not believe him on oath in a Court of justice. The fact that the character of the witness is assailed by a single witness, casts a reproach upon him and when the general character of the witness is assailed upon the one hand and sustained upon the other by witnesses, it then becomes a question to be decided upon by the Jury like all other questions of fact and is not to be judged by the number of witnesses for or against but by the respectability, intelligence, consistency, and means of information.

Another mode is to prove that a witness has, at different times, made conflicting statements as to material facts of the case as to which he testifies. Still another mode is by rigid and close cross-examination to involve the witness in contradictions and discrepancies as to the material facts stated by him. Immaterial discrepancies or differences in the statements of witnesses do not affect their credibility unless there is something to show that they originated in a willful falsehood and, you, gentlemen of the

Jury, are to determine how far the testimony of any impeached witness has been impaired by any invalidating process.

The Jury are the sole judges of the facts. Expert witnesses have been allowed to testify as to certain matters of issue in this case, and to state his opinion. With reference to this testimony, which you should consider and judge along with all the other proof, the Court charges you that it should be received with caution. While this kind of testimony is sometimes the only means, or the best way to reach the truth, yet it is largely a field of speculation, beset with pitfalls and uncertainties, and requires patient and intelligent consideration to reach the truth. You should give it the same consideration as all the other proof, governed by the same rules to arrive at the truth, as you are governed by in your consideration of all the proof.

Section 39-2404, Sub-section (i), Tennessee Code Annotated, provides that no death penalty shall be imposed by a jury but upon unanimous finding of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

1. The Murder was committed against a person less than twelve years of age and the defendant was eighteen years of age or older.
2. The defendant was previously convicted of one or more felonies, other than they present charge, which involve the use or threat of violence to the person.
3. The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.
4. The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.
5. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

The Court further instructs you as to the meaning of:

"Heinous" means extremely wicked or shockingly evil.

"Atrocious" means outrageously wicked and vile.

"Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

6. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.
7. The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.
8. The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.



9. The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.
10. The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general, or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office.
11. The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

The jury may not consider any statutory aggravating circumstance unless all twelve members of the jury unanimously determine, beyond a reasonable doubt, that such aggravating circumstance or circumstances exist. The jury may not consider any factors as aggravating circumstances except those statutory aggravating circumstance(s) it finds the state to have proven beyond a reasonable doubt.

Thus, if any juror or jurors find that the state has not proven a statutory aggravating circumstance beyond a reasonable doubt, the jury shall not weigh that statutory aggravating circumstance in determining the appropriate sentence. However, if all twelve jurors agree that the state has proven a statutory aggravating circumstance beyond a reasonable doubt, the jury shall then weigh the aggravating circumstance when determining the appropriate sentence.

If the jury does not unanimously find that the State has proven any statutory aggravating circumstances beyond a reasonable doubt, the sentence shall be life imprisonment. You will write your verdict upon the enclosed form attached hereto and made a part of this charge.

Section 39-2404, Subsection (j), Tennessee Code Annotated, provides that in arriving at the punishment, if the jury unanimously finds a statutory aggravating circumstance, the Jury must consider any mitigating circumstances which shall include, but which are not limited to, the following:

1. The defendant has no significant history of prior criminal activity;
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
3. The victim was a participant in the defendant's conduct or consented to the act;
4. The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;
5. The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;
6. The defendant acted under extreme duress or under the substantial domination of another person;

7. The youth or advanced age of the defendant at the time of the crime;
8. The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

A mitigating circumstance is any aspect of the defendant's history, background, character or mental state or any circumstance surrounding the criminal offense which, in fairness and mercy, weighs in favor of a life sentence. A mitigating circumstance is any circumstance which provides a reason for imposing a life sentence.

Thus, any evidence that helps to explain the offense, or why the defendant committed the offense may be a mitigating circumstance if such evidence provides a reason why a life sentence is a more appropriate punishment than a death sentence. Any evidence concerning the defendant's background, character, mental state, or personal history is a mitigating circumstance, if such evidence demonstrates a reason why a life sentence is more appropriate than a death sentence in this case.

A mitigating circumstance need not be proven beyond a reasonable doubt. It is not necessary that all twelve jurors agree on the existence of any mitigating circumstance before it may be considered by an individual jurors in determining the appropriate sentence. A mitigating circumstance may be found by any one of you individually so long as there is evidence that shows that they mitigating circumstance exists.

Thus, if any of you find that a particular aspect of the offense or of the defendant's background, character, personal history, or mental state is a mitigating circumstance, and that there is evidence supporting that circumstance, you individually may consider and weight that mitigating circumstance when making your determination whether the appropriate sentence is life or death in this case.

The court listed for you certain statutory mitigating circumstances that you as jurors shall consider when deciding whether life imprisonment or death is the appropriate sentence. This is not an exclusive list of all possible mitigating circumstances which you may consider in this case. Rather, you are free to consider as a mitigating circumstance any aspect of the defendant's character, background or history, or the circumstances surrounding the crime which you find to be mitigating, even if it has not been specifically listed as a possible mitigating circumstance in these instructions. You are not limited to considering only those mitigating circumstances specifically listed. You may find any mitigating circumstance and give it the weight you deem appropriate regardless of whether or not it is one of the listed mitigating circumstances.

When weighing the aggravating circumstances proven beyond a reasonable doubt against mitigating circumstances, you shall not simply count the number of aggravating circumstances and mitigating circumstances. Instead, you shall consider the significance of each aggravating circumstance and the significance of each mitigating circumstance when weighing them to determine the appropriate sentence. For example, it is possible

that one mitigating circumstance could outweigh three aggravating circumstances, or that two aggravating circumstances could outweigh three mitigating circumstances.

The weight you assign to any mitigating circumstance shall not depend upon whether or not it has been listed in these instructions. Rather, whether a mitigating circumstance is listed or not, the weight you give that circumstance shall depend on your determination of the significance of that mitigating circumstance.

If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. The Jury shall state in writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify in writing that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found.

As to each specific defendant, you will write your findings and verdicts on the enclosed forms attached hereto and made a part of this charge. Your verdicts should be as follows:

- (1) We, the Jury, unanimously find the following listed statutory aggravating circumstance or circumstances;

(The Jury will then list the statutory aggravating circumstance or circumstances so found beyond a reasonable doubt).

- (2) We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.
- (3) Therefore, we, the Jury, unanimously find that the punishment shall be death.

The verdicts must be unanimous and each Juror must sign their name beneath the verdicts.

If you unanimously determine that no statutory aggravating circumstance has been proved by the State beyond a reasonable doubt; or [sic] if the Jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt; but that said statutory aggravating circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. You will write your verdicts upon the enclosed forms attached hereto and made a part of this charge.

The verdict should be as follows:

"We, the Jury, unanimously find that the punishment shall be life imprisonment."

The verdict must be unanimous and signed by each Juror.

The Jury in no case, should have any sympathy or prejudice or allow anything but the law and evidence to have any influence upon them in determining their verdicts. They should render their verdicts with absolute fairness and impartiality ass [sic] they think truth and justice dictate. Take the case, consider all the evidence fairly and impartially and report your verdicts to the Court.

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Judge

## Questionnaire

In the following questionnaire, we will ask you about different decisions that different jurors or juries might have reached. We are only interested in whether you think the juror or jury used the right legal standard in making the decision. You should tell us whether the juror (or jury) followed or did not follow the law, as explained in the judge's instructions-not whether they reached the result that you would prefer. You may refer back to the judge's instructions if you wish.

1. The defendant was only 25 years of age when he committed the murder. A juror decides that the defendant's age is a mitigating circumstance. However, the other eleven jurors disagree and insist that his age is not a mitigating circumstance. This one juror believes that she cannot consider a mitigating circumstance unless the entire jury unanimously agrees that it exists. She therefore votes for the death penalty.

Has the juror followed the law in making her decision?

Yes \_\_\_\_ No \_\_\_\_ Do not know \_\_\_\_

2. A juror decides that the fact that the defendant did not directly kill the victim is a mitigating circumstance that outweighs the aggravating circumstances. He is the only juror to believe this, and he votes against imposing the death penalty.

Has the juror followed the law in making his decision?

Yes \_\_\_\_ No \_\_\_\_ Do not know \_\_\_\_

3. The jury hears evidence that the defendant cooperated with the police. The jury agrees that this is mitigating evidence, but they do not believe it has been proven beyond a reasonable doubt. The jury therefore does not consider the defendants' cooperation as a mitigating circumstance.

Has the jury followed the law in making this decision?

Yes \_\_\_\_ No \_\_\_\_ Do not know \_\_\_\_

4. The jury hears evidence that the defendant was well-behaved as a boy. They also believe that this is mitigating evidence. However, one juror notes that being a good child is not one of the mitigating circumstances that the judge specifically mentioned. For this reason, she concludes that she cannot consider this as a mitigating circumstance.

Has the juror followed the law in making her decision?

Yes \_\_\_\_ No \_\_\_\_ Do not know \_\_\_\_

5. The jury finds the existence of three aggravating circumstances and only two mitigating circumstances. Since the jury counted more aggravating circumstances than mitigating circumstances, the jury votes to impose the death penalty.

Has the jury followed the law in making this decision?

Yes \_\_\_\_ No \_\_\_\_ Do not know \_\_\_\_

6. One juror decides from the evidence that the defendant cooperated with the police. The same juror decides that the defendant's cooperation is a mitigating circumstance. The other eleven jurors argue that such cooperation cannot be considered since they do not all agree that it is a mitigating circumstance. The one juror decides to consider the defendant's cooperation with the police as a mitigating circumstance, despite the disagreement with the other eleven jurors.

Has the juror followed the law in making his decision?

Yes \_\_\_\_ No \_\_\_\_ Do not know \_\_\_\_

7. Every juror agrees that the defendant was mentally disturbed at the time of the crime. The jurors also agree that this is a mitigating circumstance. However, not all jurors agree that this mitigating circumstance outweighs the aggravating circumstances they have found. The jury therefore votes unanimously to impose the death penalty.

Has the jury followed the law in making this decision?

Yes \_\_\_\_ No \_\_\_\_ Do not know \_\_\_\_

8. The jury hears evidence that the murder was especially heinous, atrocious, or cruel. Being especially heinous, atrocious, or cruel is an aggravating circumstance under the statute. However, the jury does not believe that the cruelty of the crime has been proven beyond a reasonable doubt. The jury therefore does not consider the cruelty of the crime as an aggravating circumstance.

Has the jury followed the law in making this decision?

Yes \_\_\_\_ No \_\_\_\_ Do not know \_\_\_\_

9. A juror believes that the mitigating circumstance of the defendant being mentally retarded outweighs the aggravating circumstances. He is the only juror to feel this way, and because of his feelings he votes to impose a life sentence.

Has the juror followed the law in making his decision?

Yes \_\_\_\_ No \_\_\_\_ Do not know \_\_\_\_

10. Eleven jurors decide from the evidence that the defendant was abused as a child. The same eleven jurors decide that this history of child abuse is a mitigating circumstance. One juror disagrees that such abuse is a mitigating circumstance. Since the jurors cannot unanimously agree that being abused as a child is a mitigating circumstance, they do not consider it any further.

Has the jury followed the law in making this decision?

Yes \_\_\_\_\_ No \_\_\_\_\_ Do not know \_\_\_\_\_

11. A juror decides from the evidence that the defendant had no significant history of prior criminal activity. The same juror concludes that this lack of prior criminal activity is a mitigating circumstance that outweighs the aggravating circumstances, and the juror votes not to impose the death penalty.

Has the juror followed the law in making this decision?

Yes \_\_\_\_\_ No \_\_\_\_\_ Do not know \_\_\_\_\_

12. The instructions you read earlier contained the following sentence:

"If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death."

- a. Given the above instructions, the jury concludes that the defendant must show that the mitigating evidence outweighs the aggravating evidence before they should impose a sentence of life.

Has the jury followed the law in making its decision?

Yes \_\_\_\_\_ No \_\_\_\_\_ Do not know \_\_\_\_\_

- b. In the course of deliberation, the jury finds both aggravating and mitigating circumstances but concludes that the evidence supporting mitigating and aggravating circumstances is of equal strength.

Given the above instructions, and the finding by the jury that the proof is equal, the jury finds that the defendant has failed to show that the mitigating evidence outweighs the aggravating evidence, and, as a result, imposes a sentence of death.

Has the jury followed the law in making its decision?

Yes \_\_\_\_\_ No \_\_\_\_\_ Do not know \_\_\_\_\_

13. The jury finds that one aggravating circumstance exists and that no mitigating circumstances exist. They therefore decide they must vote to impose a sentence of death.

Has the jury followed the law in making this decision?

Yes \_\_\_\_\_ No \_\_\_\_\_ Do not know \_\_\_\_\_

14. One juror decides from the evidence that the defendant was good to his family. This one juror decides that this is a mitigating circumstance. The eleven other jurors disagree. They insist that no juror should consider the defendant's good relations with his family as a mitigating circumstance unless all twelve jurors agree that it is a mitigating circumstance. As a result, the one juror does not consider the defendant's being good to his family as a mitigating circumstance.

Has the juror followed the law in making this decision?

Yes \_\_\_\_\_ No \_\_\_\_\_ Do not know \_\_\_\_\_

15. Eleven jurors believe that the defendant's mental disturbance at the time the crime was committed is not a mitigating circumstance. One juror believes that the defendant's mental disturbance is a mitigating circumstance. That same juror decides that the mental state of the defendant outweighs the aggravating circumstances found by the jury, even though none of the other jurors do. The juror votes for life, even though the other jurors tell him that is improper.

Has the juror followed the law in making his decision?

Yes \_\_\_\_\_ No \_\_\_\_\_ Do not know \_\_\_\_\_

16. The jury unanimously agrees that the murder was especially heinous, atrocious, or cruel. They also agree that this is an aggravating circumstance, and that it is not outweighed by the mitigating circumstances that exist. As they interpret the instructions, this means they must vote to impose the death penalty, and they do so.

Has the jury followed the law in making this decision?

Yes \_\_\_\_\_ No \_\_\_\_\_ Do not know \_\_\_\_\_



17. The jury decides from the evidence that the defendant felt great remorse for committing the murder. They also decide that remorse is a mitigating circumstance, even though remorse was not one of the mitigating circumstances specifically mentioned by the judge. In deciding whether to impose a life sentence or the death penalty, they consider the defendant's remorse as a mitigating circumstance anyway.

Has the jury followed the law in making their decision?

Yes \_\_\_\_ No \_\_\_\_ Do not know \_\_\_\_

18. A juror considers all the evidence and comes to the conclusion that the mitigating circumstances, taken together, outweigh the aggravating circumstances and that death is not the appropriate punishment. However, he cannot find any individual mitigating circumstance that outweighs the aggravating circumstances. Therefore, the juror votes to impose the death penalty.

Has the juror followed the law in making this decision?

Yes \_\_\_\_ No \_\_\_\_ Do not know \_\_\_\_

19. After many hours of deliberation, the jury cannot agree on whether the sentence should be life or death. The jury finally tells the judge that they cannot reach a unanimous decision on whether to sentence the defendant to life or death. The judge thanks the jury for their efforts and dismisses them. What do you think will happen now?

- a. \_\_\_\_ by law, the judge has to sentence the defendant to life in prison.
- b. \_\_\_\_ by law, the judge has to sentence the defendant to death.
- c. \_\_\_\_ by law, there will have to be another jury trial to decide if the defendant should be sentenced to life or to death.

20. From the judge's instructions, do you know what an aggravating circumstances [sic] is?

Yes \_\_\_\_ No \_\_\_\_

21. If your answer is "yes," please write down what is meant by an aggravating circumstance.

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22. From the judge's instructions, do you know what a mitigating circumstance is?

Yes \_\_\_\_\_ No \_\_\_\_\_

23. If your answer is "yes," please write down what is meant by a mitigating circumstance.

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24. In order for the jury to decide that a defendant is guilty of murder, the jury has to be convinced of the defendant's guilt

- a. \_\_\_\_\_ beyond a reasonable doubt
- b. \_\_\_\_\_ by a preponderance of the evidence

25. In order for the jury to decide that a defendant is guilty of murder

- a. \_\_\_\_\_ all twelve jurors have to unanimously agree that the defendant is guilty
- b. \_\_\_\_\_ the twelve jurors do not have to unanimously agree that the defendant is guilty

26. Do you think a defendant sentenced to life in prison in the state of Tennessee will ever be paroled?

Yes \_\_\_\_\_ No \_\_\_\_\_

27. If you answered "yes," how many years in prison do you think a defendant sentenced to life will serve before being paroled?

\_\_\_\_\_ of years served in prison before being paroled.

28. What is your religious preference?

\_\_\_\_\_ Protestant  
\_\_\_\_\_ Catholic  
\_\_\_\_\_ Jewish  
\_\_\_\_\_ Other \_\_\_\_\_ (please write in)  
\_\_\_\_\_ None

If you checked "Protestant," please answer the next question.

29. What Protestant denomination do you most closely associate with?

\_\_\_\_\_ Baptist  
\_\_\_\_\_ Southern Baptist  
\_\_\_\_\_ Church of Christ  
\_\_\_\_\_ Methodist  
\_\_\_\_\_ Lutheran (other than Missouri Synod)  
\_\_\_\_\_ Episcopal  
\_\_\_\_\_ Presbyterian  
\_\_\_\_\_ Other \_\_\_\_\_ (please write in)

30. Which best describes your political views? (Check one)

\_\_\_\_\_ Very liberal  
\_\_\_\_\_ Liberal  
\_\_\_\_\_ Middle-of-the-road  
\_\_\_\_\_ Conservative  
\_\_\_\_\_ Very conservative

31. In which one of the following groups did your total family income, from all sources, fall last year before taxes?

Under \$5,000  
\$5,000-\$9,999  
\$10,000-\$19,999  
\$20,000-\$29,999  
\$30,000-\$39,999  
\$40,000-\$49,999  
\$50,000-\$59,999  
\$60,000-\$69,999  
\$70,000 and over

32. Did you find the judge's instructions difficult to understand?

Very difficult  
Somewhat difficult  
Somewhat easy  
Very easy

Thank you very much for your participation. Please feel free to write any comments below about the instructions or any other part of this survey.

## VITA

### CHASITY ANNE STOOTTS-FONBERG

Personal Data:      Date of Birth: December 23, 1973  
                         Place of Birth: Johnson City, TN  
                         Marital Status: Single

Education:           University High, Johnson City, Tennessee, 1992  
                         East Tennessee State University, Johnson City, Tennessee;  
                         Criminal Justice, B.A., 1999  
                         East Tennessee State University, Johnson City, Tennessee;  
                         Criminal Justice/Criminology, M.A., 2003

Professional  
Experience:           Graduate Assistant, East Tennessee State University,  
                         Department of Criminal Justice, 1999-2000  
                         Graduate Assistant, East Tennessee State University,  
                         Women's Resource Center, 2001-2002

Honors and  
Awards:              Criminal Justice Graduate Society, 1999-2000  
                         Graduate and Professional Student Society, 1999-2000  
                         Phi Kappa Phi Honor Society, 2001-present